

The Emmett Till Unsolved Civil Rights Crime Act: The Cold Case of Racism in the Criminal Justice System

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I. THE “COLD CASE” BENEATH THE SURFACE OF THE CRIMINAL JUSTICE SYSTEM

A recent episode of the popular television show *Cold Case* depicted the 1964 murder of a northern, white, middle-class housewife by a Klansman-in-training, who wanted to stop her work with the Freedom Schools of Mississippi during the civil rights movement.¹ True to the underlying premise of the show, the case went unsolved until more than forty years later—not because racist southern police stood idly by to the violence of the Ku Klux Klan, but because when her fellow activists went to report the crime to police in Philadelphia, the officer dismissed the voices of the group, composed of two African-American women and a Jewish woman.² As a result, the women left her body by the side of the road and police “unwittingly” mischaracterized her death as an accidental hit and run.³ Certainly, the narrative of this episode speaks to the racial politics of the criminal justice system in 1964, but what message does its resolution convey about those politics? One possible message is that racist cops walked the beat in places like Philadelphia as well as Mississippi in 1964. Another possibility is that whites as well as African-Americans were the victims of racially motivated violence during the civil rights movement. However, in offering these messages, the episode’s narrative operates on a particular understanding of what constitutes racism: intentional acts (or omissions) committed by individuals who were motivated by their racial animus.

Not entirely unlike the murder in the *Cold Case* episode, many racially motivated murders from the civil rights era went unresolved as a result of being “misabeled” as accidental killings or as missing-person cases.⁴ Other cases faced the obstructionist efforts of biased white police officers and

¹ *Cold Case: Wednesday’s Women* (CBS television broadcast Oct. 12, 2008).

² *Id.*

³ *Id.*

⁴ E.g., 154 CONG. REC. S9351 (daily ed. Sept. 24, 2008) (statement of Sen. Leahy) (quoting FBI Director Mueller’s statement that “[m]any murders during the civil rights era were . . . covered up or were misidentified as accidental death or disappearance”).

jurors, who frequently allowed killers to live out the remainder of their lives unpunished.⁵ Though *Cold Case* is only a fictional representation, advances in the use of DNA testing in criminal investigations and the undying effort of civil rights activists have made the reopening of just such cold cases a reality.⁶ In May of 2004, the Department of Justice reopened the investigation into the murder of Emmett Till, a fourteen-year-old African American tortured and killed by two white men for allegedly whistling at a white woman in 1955 in Mississippi.⁷ The reopening of Till's murder, a gruesome crime that some credit with spurring the civil rights movement in the late 1950s,⁸ in conjunction with the efforts of civil rights activists and organizations, has galvanized congressional support to address these unsolved hate crimes. These efforts have culminated most recently in Congress passing the Emmett Till Unsolved Civil Rights Crime Act in October 2008.⁹ The Act provides funding and resources for the investigation and prosecution of unresolved, racially motivated murders from the civil rights era.¹⁰

The law plays a largely symbolic role, which is evident from the rhetoric on both sides of the aisle.¹¹ As Senator Patrick Leahy (D-Vt.) noted, this law "send[s] an important message to all Americans about the depth of our commitment" to equal justice under the law.¹² When Senator Christopher Dodd (D-Conn.) first introduced the legislation in the Senate, he described the bill as "the last and best chance we have as a nation to write a hopeful

⁵ E.g., S. REP. NO. 110-88, at 4 (2007) (noting that "[m]any of these killings were never fully investigated" and were often subject to "cover-ups").

⁶ See, e.g., David J. Garrow, Op-Ed., *Unfinished Business*, L.A. TIMES, July 8, 2007, at M1 (noting twenty-two "historically notable" cold cases that have been resolved since 1989, including the assassination of NAACP leader Medgar Evers).

⁷ Press Release, Dep't of Justice, Justice Dep't to Investigate 1955 Emmett Till Murder (May 10, 2004), available at http://www.justice.gov/opa/pr/2004/May/04_crt_311.htm.

⁸ *Id.*

⁹ Emmett Till Unsolved Civil Rights Crime Act of 2007, Pub. L. No. 110-344, 122 Stat. 3934 (2008).

¹⁰ *Id.* § 5.

¹¹ Even the bill's primary opponent in the Senate, Senator Tom Coburn (R-Okla.) recognized that the force behind the Till bill could "tell you something about America." 154 CONG. REC. S9352 (daily ed. Sept. 24, 2008) (statement of Sen. Coburn). As indicated in the Attorney General's first report to Congress in compliance with the Act, the DOJ has primarily engaged in outreach efforts to seek out assistance with open cases, and it has closed fourteen matters without prosecution—there are no matters currently under federal indictment. ATT'Y GEN., ANN. REP. ON EMMETT TILL UNSOLVED CIVIL RIGHTS CRIME ACT OF 2007 1, 5–8 (2009) (on file with author).

¹² 154 CONG. REC. S9351 (daily ed. Sept. 24, 2008) (statement of Sen. Leahy).

postscript in the struggle for racial equality in our Nation.”¹³ In discussing this “meaningful civil rights bill,” his co-sponsor Senator Leahy called upon his fellow senators to “continue [their] march toward building a more fair and just society.”¹⁴ However, more than forty years after the civil rights era, the effort seems too little, too late. Based on the amount of time that has passed since the murders, witnesses, wrongdoers, and family members of victims are likely to have passed away without justice being served.¹⁵ As a result, even the substantive goals of the legislation (the investigation and prosecution of cold cases) are themselves likely to be symbolic as efforts to change the public memory of these crimes and to publicly name individuals as racist murderers.¹⁶

The overtly symbolic nature of this legislation raises the question: What does the passage of this law say about the racial politics of the criminal justice system in the twenty-first century? This Note seeks to explore one answer to this question by interrogating the “narrative” of racism embraced by Congress in enacting the law. In light of the racial inequality that continues to pervade the American criminal justice system, the passage of the Emmett Till Unsolved Civil Rights Crime Act attempts to close a chapter in American history by effectively turning a blind eye to the complex workings of racism. The discourses evident in the legislative history and the language of the statute itself fail to recognize the continuing role that racism plays in the criminal justice system. Rather, these discourses coalesce into a narrative of American racism that is limited to intentional acts of racial terrorism perpetrated against innocent victims, a reality of racism which these discourses assert has all but faded completely into America’s distant past. By utilizing this narrative of American racism, the symbolic reach of the Act moves beyond an effort at righting past wrongs to perpetuating the very evil the Act is intended to combat—racism in the criminal justice system.

¹³ 153 CONG. REC. S1788 (daily ed. Feb. 8, 2007) (statement of Sen. Dodd).

¹⁴ 153 CONG. REC. S1789–90 (daily ed. Feb. 8, 2007) (statement of Sen. Leahy).

¹⁵ See Emmett Till Unsolved Civil Rights Crime Act § 2.

¹⁶ See *Emmett Till Unsolved Civil Rights Crime Act: Joint Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties and the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary on H.R. 923*, 110th Cong. 60 (2007) [hereinafter *Joint Hearings*] (statement of Rita L. Bender, Esq., Skellenger Bender) (“[These] criminal trials serve both to impose punishment upon the perpetrators for their individual wrongdoing, but also to acknowledge societal responsibility for the racism which permitted, and even encouraged the violence to flourish.”); 154 CONG. REC. S7549 (daily ed. July 28, 2008) (statement of Sen. Leahy) (“It is disgraceful that it has taken us so long to take this basic step to honor their memories and pursue justice too long delayed.”).

Part II of this Note lays out the theoretical framework for pursuing this analysis rooted in critical race theory and discursive analysis.¹⁷ This Part further describes three prominent discourses of racism and the ways in which they shed light on the operation of race in the criminal justice system. The particular narrative of racial injustice and the discourses deployed by Congress in enacting the Emmett Till Unsolved Civil Rights Crime Act to construct this narrative are the subject of Part III of this Note.¹⁸ This analysis reveals how such legislative efforts circumscribe as well as reinforce which persons “count” as victims of racial injustice and what kind of racism is legally actionable in the criminal justice system. Part IV addresses the broader impact of this narrative of racism on the criminal justice system by highlighting the racial inequalities that such legislation effectively elides, including racial disparities in capital punishment and incarceration.¹⁹ Finally, in Part V, this Note makes recommendations for legislative efforts that more fully embrace the ongoing struggle toward racial equality in the criminal justice system.²⁰

II. NARRATIVES OF RACISM: HOW TELLING THE STORY MATTERS

As with any text, every piece of legislation is rich with narrative, although some stories are more explicit than others. In some ways, “storytelling” is a central aspect of the Emmett Till Unsolved Civil Rights Crime Act due to its symbolic nature. Stories of racially motivated murders followed by serious miscarriages of justice fill its legislative history.²¹ However, the inclusion of these stories as a “call to arms” to fight racial injustice also implicates those stories that go untold—what does their absence say about this law? The law itself also tells a particular story, one about how resources should be allocated to address racial injustice. Why do any of these stories matter? The answer lies in who “owns” these stories and the ability of these stories to shape our lived realities along racial lines.

A. *Critical Race Theory and Reading the Law as Narrative*

Coming out of the Critical Legal Studies movement, Critical Race Theory (CRT) offers an analytical perspective of the law that is “marked by

¹⁷ See *infra* Part II.

¹⁸ See *infra* Part III.

¹⁹ See *infra* Part IV.

²⁰ See *infra* Part V.

²¹ E.g., S. REP. NO. 110-88, at 21–26 (2007) (listing seventy-four examples of such murders); 154 CONG. REC. H5807 (daily ed. June 23, 2008) (commemorating the forty-fourth anniversary of Freedom Summer).

[a] consciousness of the history and experience of subordinated people.”²² Utilizing this context, CRT scholars attempt to draw attention to the ways in which the policing of racial boundaries is central to the law and society.²³

CRT operates from the premise that American law did not develop in isolation from racism (and vice versa) and as a result, the law and racism share a symbiotic existence.²⁴ However, while recognizing the centrality of racism in the development of the law, critical race theorists also recognize the value of the law as a tool in the struggle for equality.²⁵ From this understanding of the law, the goal of CRT is a pursuit of justice focused on substantive racial equality.

One way that critical race theorists accomplish this goal is to underscore the power of storytelling and its role in the social construction of racial categories.²⁶ By fortifying a “majoritarian mindset,” storytelling acts as an obstacle to seeking racial justice because it creates a “bundle of presuppositions, received wisdoms, and shared cultural understandings” that are brought to bear on discussions of race relations.²⁷ Because the viewpoints of the dominant group shapes these narratives, they naturalize and normalize this mindset in a manner that silences dissent articulated from the viewpoints of minority groups.²⁸ As Richard Delgado has noted, the “stories or

²² MARI J. MATSUDA, *WHERE IS YOUR BODY? AND OTHER ESSAYS ON RACE GENDER AND THE LAW* 51 (1996).

²³ For a prominent example of CRT scholarship that addresses the articulation of race in the construction of our democracy, see CHARLES W. MILLS, *THE RACIAL CONTRACT* 3 (1997) (arguing that the social contract model of democracy is premised upon a racial contract that subordinates people of color to whites).

²⁴ See, e.g., RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 3–9 (2001) [hereinafter DELGADO & STEFANCIC, *INTRODUCTION*]; MATSUDA, *supra* note 22, at 52; Vanita Gupta, *Critical Race Lawyering in Tulia, Texas*, 73 *FORDHAM L. REV.* 2055, 2055 (2005) (“[T]he law is contingent upon the social and political realities of inequality and racial power.”).

²⁵ See sources cited *supra* note 24.

²⁶ Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 *VA. L. REV.* 461, 462 (1993) [hereinafter Delgado & Stefancic, *Bibliography*]; see DELGADO & STEFANCIC, *INTRODUCTION*, *supra* note 24, at 37–46.

²⁷ Delgado & Stefancic, *Bibliography*, *supra* note 26, at 462.

²⁸ This is not to suggest that there is one coherent viewpoint among either whites or people of color as a group. Instead, this is meant to convey that the confluence of interests among these groups is differentially represented in one respect by narratives that create an illusion of coherence. However, some theorists might argue that people of color offer a particular epistemological standpoint by virtue of their shared subordination. See, e.g., Patricia Hill Collins, *Comment on Hekman’s “Truth and Method: Feminist Standpoint Theory Revisited”: Where’s the Power?*, in *THE FEMINIST STANDPOINT THEORY READER* 247, 247–54 (Sandra Harding ed., 2004); DELGADO & STEFANCIC, *INTRODUCTION*, *supra* note 24, at 9; Mari Matsuda, *Looking to the Bottom: Critical Legal*

narratives told by the ingroup remind it of its identity in relation to outgroups, and provide it with a form of shared reality in which its own superior position is seen as natural.”²⁹ In response to this use of narrative for the purposes of consolidating power, several critical race theorists have called for the telling of “counterstories” to disrupt the status quo and challenge the naturalization of racial inequality.³⁰

Some critical race theorists analyze the intersection of storytelling and the legal system through the theoretical lens of “law as literature.”³¹ By reading the law as literary text,³² these scholars expose the ways in which the law utilizes rhetoric to construct universal and coherent truths as well as to erase any complexities that might disrupt this illusion of coherence.³³ Because the law emphasizes particular narratives over other competing narratives, the legal system is a “preeminent . . . site of racial contestation” in drawing the boundaries of socially acceptable race relations.³⁴ Narrative analysis also reveals how the creation and articulation of laws function as a “racial project”: “an interpretation, representation, or explanation of racial dynamics, and an effort to reorganize and redistribute resources along particular racial lines.”³⁵ As a racial project, the law ultimately defines “what will be construed as legitimate claims of injury and awards of remedy” in the context of racial equality.³⁶ Thus, exploring the narrative power of law offers an avenue for interrogating the law as a racial project.³⁷

Studies and Reparations, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 63, 63–64 (Kimberlé Crenshaw et al. eds., 1995).

²⁹ See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412 (1988).

³⁰ *Id.* at 2414, 2435–38; see, e.g., Derrick Bell, *The Power of Narrative*, 23 LEGAL STUD. F. 315, 316–17 (1999) (using legal storytelling in the law classroom to challenge understandings of anti-discrimination law).

³¹ Paul Gewirtz, *Narrative and Rhetoric in the Law*, in LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW 2, 3 (Peter Brooks & Paul Gewirtz eds., 1996) (emphasis omitted).

³² *Id.* at 4.

³³ PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 8–11 (1991).

³⁴ MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S*, at viii (2d ed., 1994).

³⁵ *Id.* at 56 (emphasis omitted).

³⁶ CARL GUTIÉRREZ-JONES, *CRITICAL RACE NARRATIVES: A STUDY OF RACE, RHETORIC, AND INJURY* 31 (2001).

³⁷ See MATSUDA, *supra* note 22, at 51 (“Contrasting the understanding of law derived from these [counterstories] with the understanding derived from traditional legal sources makes for dramatic tension as well as jurisprudential enlightenment.”). This undertaking should not be confused with an effort to root out the intentions of any particular actors in the shaping of our legal system. Rather, this Note is an effort to offer

B. Critical Discourse Analysis and Discourses of Racism

Critical discourse analysis is a particular methodological device that can be utilized to read the law as a text for the purposes of critiquing its narrative of race relations. As a tool in the examination of the racial project of the law, critical discourse analysis provides an interdisciplinary approach for understanding the role of language in reproducing social and political hegemony.³⁸ Within the framework of critical discourse analysis, the term “discourse” refers to “a way of signifying a particular domain of social practice from a particular perspective.”³⁹ This definition reflects the significance of the context of language use in that discourse is reflective of a relationship to the “particular . . . situation(s), institution(s) and social structure(s) which frame it.”⁴⁰ In other words, language is always a site of contestation, reflecting a struggle between competing interests represented in different ways of speaking, describing, and representing, the choice of which hinges on the context of communication.⁴¹ At the same time, however, this choice is constrained by what discourses are available—as discourse is both “socially *constitutive* as well as socially shaped.”⁴²

Discourse implicates power relations through its use in “ordering . . . human multiplicities,” by defining and differentiating the boundaries between individuals, groups, and resources.⁴³ As a result, one

a race conscious critique of our legal system and to shake the foundations of “majoritarian mindset.” Moreover, the interrogation of the narrative power of law need not merely be a theoretical project limited to the realm of academia. For an example of how counterstories in particular can play a dramatic role in recasting litigation, see Gupta, *supra* note 24, at 2067.

³⁸ See NORMAN FAIRCLOUGH, *CRITICAL DISCOURSE ANALYSIS: THE CRITICAL STUDY OF LANGUAGE* 4–10 (1995).

³⁹ Gilbert Weiss & Ruth Wodak, *Introduction: Theory, Interdisciplinarity and Critical Discourse Analysis*, in *CRITICAL DISCOURSE ANALYSIS: THEORY AND INTERDISCIPLINARITY* 1, 22 (Gilbert Weiss & Ruth Wodak eds., 2003) (citation omitted); see also GILLIAN ROSE, *VISUAL METHODOLOGIES: AN INTRODUCTION TO THE INTERPRETATION OF VISUAL MATERIALS* 142 (2d ed. 2007) (describing discourse as “the way a thing is thought, and the way we act on the basis of that thinking”).

⁴⁰ Weiss & Wodak, *supra* note 39, at 13 (citation omitted).

⁴¹ *Id.* at 14–15.

⁴² Norman Fairclough & Ruth Wodak, *Critical Discourse Analysis*, in *2 DISCOURSE AS SOCIAL INTERACTION* 258, 258 (Teun A. Van Dijk ed., 1997).

⁴³ See Fairclough & Wodak, *supra* note 42, at 258 (noting that discourse implicates power through the way it “represent[s] things and position[s] people”); MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 218 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (outlining how the “disciplines” or academic discourses serve to individuate bodies in ways that produce and reproduce an internalized disciplinary power).

focus of critical discourse analysis is to investigate the ways in which “language mediates ideology in a variety of social institutions” as a way of “establishing and maintaining unequal power relations.”⁴⁴ In pursuing this goal, critical discourse analysis “investigate[s] critically social inequality as it is expressed, constituted, [and] legitimized . . . by [discourse].”⁴⁵ Methodologically, critical discourse analysis questions the dominance of some discourses over others with particular reference to its “institutional location” or the “social authority” of the speaker.⁴⁶

This intersection of discourse and the institutional location of its speaker becomes significant because it has the ability to generate material effects, particularly where discourse is situated within the legal system, which functions to allocate resources and define appropriate conduct.⁴⁷ By applying this methodological framework to the narrative of racial injustice arising out of the Emmett Till Unsolved Civil Rights Crime Act, this Note will identify the discourses that comprise this narrative and critique those discourses by assessing their impact on the criminal justice system.

C. Three Overlapping Understandings of Racial Inequality

Before turning to the discursive and narrative analysis that is the subject of this Note, a general foundation is necessary for understanding some of the available ways for speaking about and understanding the experience of racial inequality. Whether an instance of racial disparity receives recognition as an effect of “racism” wholly depends on how we define that term (and the significance that individuals, groups, and institutions attach to it).⁴⁸ In light of this tension, critical race theorists argue that racism is “adaptive” and “resilient” in that it can exist in multiple formulations that produce racial

⁴⁴ Weiss & Wodak, *supra* note 39, at 14.

⁴⁵ *Id.* at 15.

⁴⁶ ROSE, *supra* note 39, at 166.

⁴⁷ See John A. Powell, *Structural Racism: Building upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 815–16 (2008) (“Our collective actions and inactions have created structures that perpetuate group-based inequality.”).

⁴⁸ One need only look to debates over the appropriateness of affirmative action to discover that different views of what constitutes racism shape whether racial inequities “matter” or simply form a “normal” part of life. For example, the overwhelming underrepresentation of minorities in higher education at large does not qualify as a form of racism where that term is only understood to encompass an intentional decision based upon an individual’s race. See, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 270–71 (2003) (holding admissions program invalid for its failure to make individualized assessments where race is one of many factors).

inequities.⁴⁹ As such, eradicating one type of racialized outcome simply does not put an end to all forms of racism.

1. *Intentional Racism*

Perhaps the discourse of intentional racism is the most easily understood and identified by individuals coming of age in the post-civil rights era. This discourse is also the understanding of racism that is most commonly associated with the Jim Crow regime:⁵⁰ purposeful discrimination against individuals based on their race solely because of racial animosity.⁵¹ As the more traditional discourse of racism, this discourse limits racism to the actual “prejudiced belief . . . [of] a particular bad actor” that causes the discriminatory action.⁵² In this way, intentional racism focuses in on the bad “moral character of the actor” while at the same time diminishing other factors that play a role in causing discriminatory behavior based on race.⁵³ This discourse of discrimination is attractive because it generates a sense that there is a clear perpetrator with a wrongful intent who can be held accountable for his actions.⁵⁴

This preference manifests itself in the American legal system, which has a tendency to acknowledge only intentional racism as legally actionable.⁵⁵ This is reflected in the requirements of a *prima facie* case for disparate treatment claims of employment discrimination under Title VII of the Civil Rights Act of 1964⁵⁶ as well as claims of race discrimination under the Equal Protection Clause of the Fourteenth Amendment.⁵⁷ Perhaps one of the most infamous examples of intentional racism rearing its head in the American

⁴⁹ MATSUDA, *supra* note 22, at 53.

⁵⁰ For an illustration of this popular understanding of the Jim Crow era in the South, see the discussion of the *Cold Case* episode, *supra* Part I.

⁵¹ Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L. J. 1717, 1811 (2000).

⁵² powell, *supra* note 47, at 794.

⁵³ *See id.*

⁵⁴ *See* discussion, *infra* Part III.B.1.

⁵⁵ Eva Paterson et al., *The Id, the Ego, and Equal Protection in the 21st Century: Building Upon Charles Lawrence's Vision to Mount a Contemporary Challenge to the Intent Doctrine*, 40 CONN. L. REV. 1175, 1178 (2008).

⁵⁶ *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989) (requiring that race was a motivating factor to prove intent to discriminate in “mixed motives” cases); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805–06 (1973) (requiring that race was a determinative influence to prove intent to discriminate in “pretext” cases).

⁵⁷ Washington v. Davis, 426 U.S. 229, 247–48 (1976) (requiring discriminatory purpose for analysis under the Fifth and Fourteenth Amendments).

criminal justice system is the testimony of LAPD Detective Mark Fuhrman in the O.J. Simpson trial.⁵⁸ Despite initially impressing the court with his professionalism, the defense ultimately uncovered Fuhrman's deep racial hatred—he regularly used the “n-word” in conversation, but also “boasted privately about using his position as a police officer to brutalize suspects and enact his own racist beliefs.”⁵⁹ Interestingly, the prosecution in the case was successful (as far as the media, if not the jury, was concerned) in arguing that Fuhrman's racism had “nothing to do with the widespread practices of the Los Angeles Police Department.”⁶⁰ Thus, intentional racism captures racial disparities caused by the intentional bad acts of the agents of the criminal justice system (from police to juror) due to their racial hatred, but cannot recognize the disparities caused by policies and practices within the institutions that comprise the criminal justice system.

2. Institutional Racism⁶¹

How do we account for the fact that African Americans are incarcerated at nearly six times the rate of whites?⁶² Or the stark differences in sentencing for possession of powder cocaine as opposed to crack cocaine which fall sharply along racial lines?⁶³ Institutional racism acknowledges that broader social structures can racially discriminate without the intentional acts of racially motivated individuals.⁶⁴ In addition to racist policies embedded within specific organizations such as a school or business, institutional racism can be located more broadly in how we understand human interaction and norms, such as notions of crime, education, marriage, and equality.⁶⁵ This formulation of racism posits that there are “widely shared but unconsidered understandings of race” that are pervasive in the structuring of

⁵⁸ George Lipsitz, *The Greatest Story Ever Sold: Marketing and the O.J. Simpson Trial*, in *BIRTH OF A NATION: HOOD: GAZE, SCRIPT, AND SPECTACLE IN THE O.J. SIMPSON CASE* 21–23 (Toni Morrison & Claudia Brodsky Lacour eds., 1997).

⁵⁹ *Id.* at 22.

⁶⁰ *Id.*

⁶¹ This is also frequently referred to as “systemic” or “structural” racism.

⁶² MARC MAUER & RYAN S. KING, *THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY* 3 (2007), <http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=593>.

⁶³ DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 141–45 (1999).

⁶⁴ powell, *supra* note 47, at 791, 796 (“Institutional racism shifts our focus from the motives of individual people to practices and procedures within an institution.”).

⁶⁵ See López, *supra* note 51, at 1723–25, 1823–24.

society such that they are taken as natural or as social norms.⁶⁶ Some scholars broaden the scope of this discourse of racism as part of a discourse of “structural racism” or “structural racialization,” which emphasizes the “interaction of multiple institutions in an ongoing process of producing racialized outcomes.”⁶⁷ They argue that the discourse of institutional racism places undue emphasis on the operations within institutions rather than between institutions, and thus, an appeal to broader social structures is required to more accurately capture the social construction of racial norms.⁶⁸

Institutional racism (as well as structural racism) is more difficult to address and challenge through the legal system because it takes the form of seemingly neutral practices and policies adopted by groups to shape and prescribe behavior.⁶⁹ In spite of this obstacle, this understanding of racism is recognized, if not widely embraced, for remedy under the law, although in a somewhat limited form. For example, Title VII includes a “disparate impact” theory of recovery for facially neutral practices that have racially discriminatory effects when there is not a business necessity for their use.⁷⁰ However, within the criminal justice system, institutional racism is largely naturalized. For example, legal scholar Dorothy Roberts questions the legitimacy of drug war policies that criminalize the distribution of crack cocaine to fetuses because of the disproportionate impact on women of color.⁷¹ While most people would not think twice that such a crime should certainly exist, it does raise the question of why there is not a similar criminalization of the behavior that gives rise to fetal alcohol syndrome (which produces more harm to fetuses) or why drug treatment might not be a better solution to this problem.⁷² Roberts attacks this racial disparity as the result of an institutionalized racism that has developed out of an historical devaluation of African-American motherhood that has been normalized within the law.⁷³ While this example illustrates how the law can be

⁶⁶ *Id.* at 1729.

⁶⁷ *powell*, *supra* note 47, at 791.

⁶⁸ *Id.* at 798.

⁶⁹ One might consider the naturalization of the Socratic method in legal education, which tends to disproportionately disadvantage students of color.

⁷⁰ *See Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971).

⁷¹ DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 150–201 (1997).

⁷² *See id.*

⁷³ *See id.* In fact, Roberts’ entire text is dedicated to exploring how the norm of devaluing African-American motherhood influences the legal system and other institutions, from the disproportionate use of African-American women as surrogates to the forced sterilization and implantation of Norplant disparately faced by African-American women.

permeated with racialized norms, institutional racism also has an impact on a more individual level.

3. *Unconscious Racism*

In some ways, unconscious racism can be described as the effect of an institutionalized racism internalized at the individual level. To the extent that individuals are a part of the development and perpetuation of institutions that are shaped by the normalization of racial difference, people “inevitably share many ideas, attitudes, and beliefs that attach significance to an individual’s race.”⁷⁴ Professor Linda Hamilton Krieger, for example, has utilized the insights of cognitive psychology to explain how racial “stereotypes, like other categorical structures, are cognitive mechanisms that *all* people, not just ‘prejudiced’ ones, use to simplify the task of . . . retaining information about people.”⁷⁵ As a result, these “stereotypes bias . . . decisionmaking” and ultimately “operate beyond the reach of decisionmaker self-awareness.”⁷⁶ Due to the internalization of these stereotypes, individuals are unaware of the ways in which racial motivations affect their actions.⁷⁷

Some theorists argue that unconscious racism is the result of a post-civil rights era environment that punishes, or at least vilifies, explicit expressions of racial motivations.⁷⁸ In such a climate, an unconscious “color-blind racism” has flourished through the use of structural supports that distract and downplay the impact of racial disparities including “abstract liberalism” (which utilizes concepts like equal opportunity), “naturalization” of racial differences, the attribution of racial difference to culture, and the “minimization of racism.”⁷⁹ Shaped by these forces, individuals claim to see people separately from their race, but their experiences are always already mediated by the race relations that shape social structures.⁸⁰

⁷⁴ Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987).

⁷⁵ Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1187–88 (1995).

⁷⁶ *Id.* at 1188.

⁷⁷ Lawrence, *supra* note 74, at 322.

⁷⁸ EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* 11 (2d ed. 2006).

⁷⁹ *Id.* at 28–29.

⁸⁰ See Joan W. Scott, *The Evidence of Experience*, in *FEMINIST APPROACHES TO THEORY AND METHODOLOGY: AN INTERDISCIPLINARY READER* 96 (Sharlene Hesse-Biber et al. eds., 1999) (“Experience is at once always already an interpretation *and* something that needs to be interpreted.”).

An example of how unconscious racism plays out within the context of the criminal justice system is best understood through the context of prosecutorial discretion as to whether to charge an individual with a particular crime. Angela J. Davis, a former public defender for the District of Columbia, noted the role that unconscious racism can play in such a process in her description of the murder of John Nguyen, a middle-aged Vietnamese immigrant.⁸¹ Nguyen was attacked with a large machete by his landlord (who rented him a walk-in closet in his apartment), after Nguyen teased his landlord for failing to entice a woman to sleep with him.⁸² Davis expressed her shock that the prosecutor's office charged Nguyen's landlord, a twenty-five-year-old white bartender, with assault with a dangerous weapon rather than murder. Moreover, the prosecutor's office suggested to the public defender that the landlord had a "good claim of self-defense," an offer she had never experienced with regard to her other predominantly African-American clients.⁸³ Despite rising out of the decision of an individual prosecutor, the racial disparity that Davis and her colleagues recognized was not one that could be recognized by intentional discrimination, rather it was an effect of unconscious racism within the criminal justice system that has no current remedy. Depending on the discourse through which racism is understood, racial disparity becomes a matter of public and legal concern, which is further evidenced in the narrative of racial injustice that emerges in the passage of the Emmett Till Unsolved Civil Rights Crime Act.

III. LEGISLATING THE STORY OF RACISM: THE EMMETT TILL UNSOLVED CIVIL RIGHTS CRIME ACT OF 2007

In 1955, the image of fourteen-year-old Emmett Till's battered body on the cover of *Jet* magazine memorialized the depth of terror and trauma caused by a criminal justice system that remained silent in the face of intentional racism.⁸⁴ This horrific act of intentional racism did not go unnoticed by the "mainstream" (read: white) media of the time. After an all-white jury acquitted them a month later, Till's murderers Roy Bryant and

⁸¹ Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 13–15 (1998).

⁸² *Id.* at 14–15.

⁸³ *Id.* This racial disparity was only further compounded by the fact that when the ambulance first arrived on the scene of the murder, they took away the landlord who, though uninjured, was covered in Nguyen's blood. *Id.* at 14. A second ambulance came to retrieve the fatally wounded Nyugen. *Id.*

⁸⁴ See Press Release, S. Poverty Law Ctr., Teaching Tolerance, Emmett Till: Justice Too Long Delayed (Aug. 25, 2005) (on file with author).

J.W. Milam ultimately confessed their crime in *Look* magazine.⁸⁵ These media representations importantly drew attention to the cruel realities of the Jim Crow regime and in so doing, worked to vilify intentional racism. More than fifty years later, President George W. Bush and Congress embraced this particular story of intentional racism through the enactment of the Emmett Till Unsolved Civil Right Crime Act in October 2008.⁸⁶ The Act provided for the development of a “cold case” unit within the Department of Justice⁸⁷ to coordinate “the investigation and prosecution of violations of criminal civil rights statutes [prior to 1970 that] resulted in a death.”⁸⁸ In addition, it authorized appropriations for over \$100 million to support this unit as well as funds for grants to state and local law enforcement through 2017.⁸⁹

Attempts to pass similar legislation date back to as early as 2005 in response to the reopening of several civil rights era murder cases, including the 1964 murder of civil rights activists James Chaney, Andrew Goodman, and Michael Schwerner in Mississippi.⁹⁰ Civil rights activist Alvin Sykes, chairman of the Emmett Till Justice Campaign who fought to have Till’s homicide reopened by the Department of Justice, played a pivotal role in drawing the attention of Congress to these cold cases.⁹¹ In February 2006, the Federal Bureau of Investigation began a project to identify unsolved (or inadequately resolved) racially motivated murders that occurred during the civil rights movement.⁹² A year later, the FBI and the Department of Justice joined forces with the NAACP, the National Urban League, and the Southern Poverty Law Center in the formal development of the Civil Rights-Era Cold

⁸⁵ *Id.*; William Bradford Huie, *The Shocking Story of Approved Killing in Mississippi*, LOOK, 1956, available at http://www.pbs.org/wgbh/amex/till/sfeature/sf_look_confession.html. In 1954, *Look* magazine boasted a circulation of 3.7 million and competed with *Time* and other similar magazines. See *Shake-Up at Look*, TIME, Jan. 11, 1954, at 50, available at <http://www.time.com/time/magazine/article/0,9171,819349,00.html>.

⁸⁶ Emmett Till Unsolved Civil Rights Crime Act of 2007, Pub. L. No. 110-344, § 509, 122 Stat. 3934 (2008).

⁸⁷ The Criminal Section of the Civil Rights Division houses the cold case unit, which is led by Paige Fitzgerald. See U.S. Dept. of Justice, Civil Rights Division, Criminal Section, available at <http://www.justice.gov/crt/crmsec.php>.

⁸⁸ Emmett Till Unsolved Civil Rights Crime Act of 2007 § 509, 122 Stat. at 3935.

⁸⁹ *Id.*

⁹⁰ Press Release, S. Poverty Law Ctr., *supra* note 84.

⁹¹ See 154 CONG. REC. S9352 (daily ed. Sept. 24, 2008) (statement of Sen. Coburn); Laura Parker, *Perseverance Pays Off for Civil Rights Activist*, USA TODAY, Mar. 19, 2007, at 2A.

⁹² Press Release, Fed. Bureau of Investigation, Partnerships Established with NAACP, the National Urban League, and the Southern Poverty Law Ctr. (Feb. 27, 2007), available at <http://www.fbi.gov/pressrel07/coldcase022707.htm>.

Case Initiative.⁹³ These efforts provided cause for much debate in Congress over how best to provide its own support for the initiative.⁹⁴

The Act, in a version sponsored by Representative John Lewis (D-GA) referred to as the “Till Bill,” initially passed the House of Representatives in June of 2007 by a vote of 422 to 2.⁹⁵ With such widespread support in the House and signals of approval from the Bush administration, a Senate victory seemed not far behind.⁹⁶ Despite moving smoothly through the Senate Judiciary Committee under the sponsorship of Senator Christopher Dodd (D-Conn.) and Senator Patrick Leahy (D-Vt.),⁹⁷ the Till legislation⁹⁸ faced obstruction from Republican opponents on the Senate floor.⁹⁹ As a result, the Senate did not pass the Emmett Till Unsolved Civil Rights Crime Act until the end of September 2008 and President George W. Bush signed it into law the following month, more than three years after the efforts of Alvin Sykes and others brought the issue to the attention of Congress.¹⁰⁰

With the recent advances in criminal investigation through the use of DNA and the growing popular interest in “cold cases,”¹⁰¹ the passage of the

⁹³ *Id.*

⁹⁴ See Letter from Sen. Coburn to Sen. Dodd (June 25, 2007), reprinted in 154 CONG. REC. S8018 (daily ed. Aug. 1, 2008). While Senator Coburn insisted that the Cold Case Initiative was already adequately addressing the problem, more than two years after its inception and with more than 26 cases forwarded for prosecutorial review, the Department of Justice pursued no new trials. Deborah Hastings, *FBI's Civil Rights Initiative: No Trials Yet*, USA TODAY, Sept. 6, 2008, http://www.usatoday.com/news/topstories/2008-09-06-1232913827_x.htm (suggesting also that the initiative may have been nothing more than an attempt to improve the image of former Attorney General Alberto Gonzales).

⁹⁵ Ben Evans, *House Votes to Reopen Civil Rights Cases*, USA TODAY, June 20, 2007, http://www.usatoday.com/news/Washington/2007-06-20-congress-cold-case_n.htm. Representatives Lynn Westmoreland (R-Ga.) and Ron Paul (R-Tex.) provided the two nay votes against the bill. *Id.*

⁹⁶ See *id.*

⁹⁷ 153 CONG. REC. S9208 (July 13, 2007) (statement of Sen. Leahy).

⁹⁸ Emmet Till Unsolved Civil Rights Crime Act of 2007, Pub. L. No. 110-334, § 509, 122 Stat. 3934 (2008).

⁹⁹ See 154 CONG. REC. S7085–86 (July 22, 2008) (statement of Sen. Leahy); 153 CONG. REC. S12371 (Oct. 1, 2007) (statement of Sen. Coburn); 153 CONG. REC. S9208 (July 13, 2007) (statement of Sen. Leahy).

¹⁰⁰ Emmett Till Unsolved Civil Rights Crime Act § 509; 154 CONG. REC. S9353 (Sept. 24, 2008) (statement of Sen. Dodd).

¹⁰¹ See Scott Turow, *Still Guilty After All These Years*, N.Y. TIMES, Apr. 8, 2007, at 11; see also Felicia R. Lee, *Seeking Justice for Victims of Terror Long Ago*, N.Y. TIMES, Oct. 4, 2008, at B7 (discussing the *Murder in Black and White* documentaries featuring cold cases from the civil rights era). For evidence that interest in cold cases generally has grown more pervasive in popular culture, see, e.g., *Cold Case* (CBS television broadcast

Emmett Till Unsolved Civil Rights Crime Act begs the question: Why focus on these cases now?¹⁰² As pointed out to journalists by a spokesperson for Rep. Lynn Westmoreland, one of the two opponents to the bill in the House of Representatives, the Department of Justice “can’t prosecute dead people.”¹⁰³ While this fact was certainly not unclear to the sponsors of the legislation,¹⁰⁴ the overwhelming support for the Act suggests that perhaps something more than resolving these particular crimes was at stake in its passage.

Viewing the Act through the lens of critical race theory brings the question into greater focus: How does the narrative power of this legislation serve as part of a larger racial project that normalizes particular discourses of racial inequality through the criminal justice system?¹⁰⁵ Unlike the picture of Emmett Till on the cover of *Jet* and the interview of his killers in *Look*, this legislation does not attempt to call attention to any present-day instances of racism in the criminal justice system. However, the passage of the Emmett Till Unsolved Civil Rights Crime Act of 2007 does offer several stories about present-day race relations in the United States. By vilifying an intentional racism that gave rise to America’s historical struggle for civil rights and destroyed the lives of innocent victims, the Act emphasizes a very limited view of racial justice for the twenty-first century. The discourse surrounding its passage and filling the text of the Act itself serves to define and limit who counts as a legally cognizable victim of racial injustice and what types of racial injustice are worthy of the “swift” response of legislators.

A. Civil Rights Martyrs: The Legally Cognizable Victims of Racial Injustice

One major facet of the narrative of racial inequality told through the Emmett Till Unsolved Civil Rights Crime Act lies in the discourse that describes which individuals are considered its “victims” for the purposes of receiving resources and funds from the federal government. Beyond the

Sept. 28, 2003–Pres.) and *Cold Case Files* (A&E television broadcast Jan. 1, 1999–Dec. 31, 2006).

¹⁰² See Garrow, *supra* note 6, at M9 (arguing that the attention on pre-1970s murders in the Deep South ignores other racially motivated deaths, particularly in the turbulent relations among the Black Panthers and in their relations with the police in the 1970s).

¹⁰³ Evans, *supra* note 95.

¹⁰⁴ Even the text of the law makes clear that Congress recognizes the great “amount of time that has passed since the murders” and the problem posed by the “age of potential witnesses.” Emmett Till Unsolved Civil Rights Crime Act of 2007 § 2.

¹⁰⁵ See *supra* Part II.

context of the Act itself, this discourse is significant because it plays a larger cultural role in signaling what constitutes a “publicly grievable life”: the kind of life for which society at large should be made to absorb the loss.¹⁰⁶ The limiting language of the Act as well as the examples utilized by its sponsors to create popular support make clear that the victims of racial injustice whom Congress is willing to assist are those individuals who struggled nonviolently to achieve freedom only to be snuffed out by anti-civil rights violence.¹⁰⁷ A critical examination of the stories told by the Emmett Till Unsolved Civil Rights Crime Act helps to sketch the limits of this assistance from Congress, and more importantly, exposes the lives (and the loss of those lives) for which Congress deems the nation must take responsibility.

By the text of the law, the Emmett Till Unsolved Civil Rights Crime Act places two explicit limitations on the victims of racial injustice it recognizes.¹⁰⁸ The individual cases receiving aid through the Act must involve victims of a civil rights crime that resulted in death and that death must have occurred on or before December 31, 1969.¹⁰⁹ Thus, the Act unambiguously limits its reach historically to deceased victims of racist violence that took place forty or more years ago. In some ways, the historical limit is even more stringent than the specified end date for coverage because of certain jurisdictional and constitutional hurdles, including federal statutes of limitations and the effect of the Ex Post Facto Clause of the Constitution.¹¹⁰ While the explicit limits are central to the goals of the Act,

¹⁰⁶ See JUDITH BUTLER, *PRECARIOUS LIFE: THE POWERS OF MOURNING AND VIOLENCE* 34 (2006). In her analysis of the attacks on September 11, 2001, Butler discusses how the choice over which lives could be mourned by the public (even in obituaries) is a form of “nation-building” that naturalizes who “counts” as a citizen/human being. *Id.* at 21–34.

¹⁰⁷ S. REP. NO. 110-88, at 3 (2007) (noting the widespread nature of anti-civil rights violence).

¹⁰⁸ Emmett Till Unsolved Civil Rights Crime Act § 3.

¹⁰⁹ *Id.* Interestingly, Rep. John Lewis, one of the Act’s sponsors in the House, was himself the victim of racially motivated violence during the civil rights era. In 1961, Elwin Wilson physically assaulted Lewis during his protest as a Freedom Rider. See *Good Morning America* (ABC television broadcast Feb. 6, 2009). However, the Act does not make such victimization legally actionable.

¹¹⁰ *Joint Hearings*, *supra* note 16 at 17–18 (statement of Grace Chung Becker, Deputy Assistant Attorney General). In her testimony, Becker pointed out that several of the operative civil rights statutes have five-year statutes of limitation and that the operation of the Ex Post Facto Clause prevents the utilization of some statutes that were not passed until 1968 (effectively limiting their usefulness to murders occurring between 1968 and 1969). *Id.* Thus, even with the support of this Act, federal prosecutors will have to be “creative” in order to get convictions in these cases and will have to rely heavily on cooperation with state law enforcement. *Id.* at 18; see also Graham P. Shaffer, Note, *The Leesburg Stockade Girls: Why Modern Legislatures Should Extend the Statute of*

they serve in the construction of a particular discourse regarding who “counts” as a victim of racial injustice for whom Congress will allocate resources.

Beyond the explicit limitations of the Act, discourses emerge in its legislative history that also limit the type of victim deserving of its recognition. Two of these limiting discourses placed on the victims of racial injustice that Congress recognizes are that the victims must be identifiable as heroic victims in the struggle to obtain civil rights and most importantly, they must be perceived as *innocent* victims. These discourses are most clearly expressed in the efforts of Rep. John Conyers (D-Mich.) to mark the forty-fourth anniversary of Freedom Summer and the murders of three civil rights workers, Andrew Goodman and Michael Schwerner, two white men, and James Chaney, an African American.¹¹¹

As a way of emphasizing the importance of the recently passed House version of the Till Bill, Conyers recounted the murders of these men on the floor as well as the 2005 conviction of Edgar Ray Killen for his role in their deaths.¹¹² In describing the victims, Conyers highlighted their heroic efforts to bring voting rights to the African-American populace of Mississippi as part of the “Freedom Summer” project.¹¹³ On the eve of their murders, these men did nothing more than attempt to investigate a church fire when they caught the attention of police who arrested them without cause, eventually turning them over to the Ku Klux Klan and by extension, to their deaths.¹¹⁴ This story underscores a discourse of innocent victimhood, as the men were wrongfully detained by police, as well as a discourse of heroic martyrdom represented in their admirable work to bring the franchise to African Americans in Mississippi. As Conyers described them, they were “brave Americans who made the ultimate sacrifice in the name of civil rights”¹¹⁵

Limitations for Specific Jim-Crow-Era Reparations Lawsuits in the Wake of Alexander v. Oklahoma, 37 STETSON L. REV. 941, 975–76 (2008) (arguing for legislatures to extend statutes of limitation for the purpose of allowing African-American plaintiffs to seek civil remedies for offenses committed during the Jim Crow era).

¹¹¹ 154 CONG. REC. H5807 (daily ed. June 23, 2008) (statement of Rep. Conyers). In fact the murder of the two young white men was particularly resonant at the time, even drawing the attention of President Lyndon Johnson, who called upon the Navy and the FBI to investigate their disappearance. *See id.*

¹¹² *Id.*; *see also* Killen v. State, 958 So. 2d 172, 178 (Miss. 2007) (upholding Killen’s conviction).

¹¹³ 154 CONG. REC. H5807 (daily ed. June 23, 2008).

¹¹⁴ *Id.* (statement of Rep. Conyers).

¹¹⁵ *Id.* at H5808 (daily ed. June 23, 2008) (statement of Rep. Conyers). Rep. Norton (D-D.C.) also described the men as having “died for a great and noble purpose” as made

The discourse of heroism is not limited to actual civil rights activism.¹¹⁶ Certainly, the fourteen-year-old Emmett Till, namesake of the Act, did not set out to be a civil rights activist. However, the underlying discourse makes clear that the lives (and deaths) of the victims reached by the Act must ultimately stand for the civil rights struggle. In the case of Emmett Till, his death showcased the bravery of his mother who insisted that the world see the brutality of his death and subsequently spurred a movement for social change in the South.¹¹⁷ Another example of this kind of innocent martyrdom offered by the Act's supporters is the 1962 murder of Army Cpl. Roman Ducksworth, Jr., who was mistaken for a Freedom Rider after returning home to Mississippi on a long bus journey from Fort Richie where he had performed his military duty.¹¹⁸ Both Till and Ducksworth were completely innocent victims, one a child and the other a military veteran, whose deaths were easily understood as entwined with the movement for civil rights.

The categories of cases that the Senate report suggests that the DOJ, FBI, and local and state law enforcement officials should further investigate also reinforces the significance of these discourses of innocence and heroism among the deaths covered under the Act.¹¹⁹ These categories include:

(1) [P]ersons murdered because they were active in the civil rights movement; (2) persons killed by organized hate groups as acts of terror aimed at intimidating blacks and civil rights activists; (3) persons whose deaths . . . helped to galvanize the movement by demonstrating the brutality faced by African Americans in the South; or, as a catchall, (4) persons who died violently before 1970 under circumstances suggesting they were victims of racial violence.¹²⁰

The deaths described in these categories carry a weighty symbolic burden—they must have performed the heroic duty of justifying or sustaining

evident by the fact that “Mississippi today has the largest number of black public officials.” 154 CONG. REC. H5810 (daily ed. June 23, 2008) (statement of Rep. Norton).

¹¹⁶ S. REP. NO. 110-88, at 4 (“Non-activists were also targets of racial violence aimed at intimidating citizens from exercising basic rights of citizenship or resisting the social mores of Jim Crow segregation.”).

¹¹⁷ 154 CONG. REC. S9228 (daily ed. Sept. 23, 2008) (statement of Sen. Reid) (“Remember, [Till’s] courageous mother, wanting everyone to see the brutality of how her boy was killed, had an open casket. That open casket said it all.”).

¹¹⁸ S. REP. NO. 110-88, at 4.

¹¹⁹ See *id.* at 8. These categories are only suggestions of cases to consider for re-opening and not a mandate dictated to federal and state law enforcement. *Id.* at 9.

¹²⁰ *Id.* at 8. These categories were originally developed by the Southern Poverty Law Center as part of their effort to bring attention to unsolved cases from the civil rights era. *Id.*

the civil rights movement.¹²¹ Even the catchall category suggests that the deaths covered by the Act should be representative of something more than a tragic loss of life, but of a wrong “against our society.”¹²² These four thematic descriptions capture the discourse of innocent heroism that penetrates the stories of Emmett Till and Cpl. Ducksworth, and by extension, the boundary drawn by Congress in deciding which lives are deserving of government resources.

At the root of all these representations of the victims covered by the Act is a sense that Congress can rightfully describe them as innocent persons who were a part of the struggle for civil rights. In fact, the Senate Report for the Till Bill includes an appendix of “The Forgotten,” a list of seventy-four men and women whose deaths between 1952 and 1968 suggest they may have been “civil rights martyrs.”¹²³ By identifying the deaths of these individuals in such grave, but reverent terms, the report ends on a note which emphasizes that these victims had committed no wrongs, but were murdered for the example they set in achieving civil rights for African Americans. The telling of these victims’ stories marks the contours of the bodies which are deemed worthy for the receipt of justice at the government’s urging. Although not unjustifiable, the overwhelming importance of “innocence” and civil rights “heroism” in these stories nonetheless implicitly limits who may be rightfully “mourned” as a victim of racial injustice in the eyes of the law.¹²⁴

B. The Kind of Racial Injustice That Requires “Urgent” Legislative Resolve

The sponsors of the Emmett Till Unsolved Civil Rights Crime Act repeatedly called for “urgent” action to confront the racial injustice of these unsolved murders in their efforts to obtain support for the legislation.¹²⁵

¹²¹ As part of the commemoration of Freedom Summer in the House of Representatives, Rep. John Lewis (D-Ga.) emphasized a similar point. The purpose of telling the stories of these victims is to drive home that the “struggle for civil rights has been a long, hard road littered by the battered and broken bodies of countless men and women.” 154 CONG. REC. H5809 (daily ed. June 23, 2008) (statement of Rep. Lewis).

¹²² S. REP. NO. 110-88, at 7.

¹²³ *Id.* at 21. The list was originally gathered by the Southern Poverty Law Center to be included on the Civil Rights Memorial. However, at the time of its dedication in 1989, there was “insufficient information” about their deaths to attach the label “civil rights martyrs.” *Id.* Interestingly, of the seventy-four listed, only three names lack any explanation of the circumstances of their deaths. *See id.* at 24.

¹²⁴ *See* BUTLER, *supra* note 106, at 34.

¹²⁵ *E.g.*, *Joint Hearings*, *supra* note 16, at 16 (statement of Rep. Bobby Scott) (“[T]here is an urgent need for the Federal Government to provide additional resources to the Department of Justice and the FBI.”); S. REP. NO. 110-88, at 2 (“Congress recognizes

While a time-sensitive element posed by the advanced age of potential witnesses and defendants certainly exists in these cases,¹²⁶ the claim that “justice cannot afford to wait” rings with an apparent irony for the resolution of crimes that occurred more than forty years ago.¹²⁷ However, the use of such rhetoric serves a discursive function in dictating the importance of the treatment of these crimes in the twenty-first century. What makes these particular instances of racial injustice so urgent today?

Perhaps the answer lies in the narrative of racial injustice told by appealing to these historical crimes of racial violence. Effectively, the Emmett Till Unsolved Civil Rights Crime Act legislates (and reinforces) the line as to what constitutes legally actionable racism. Thus, uncovering the discourses of racism deployed by the Act’s supporters is vital to understanding how the law defines acceptable (and ultimately legal) race relations.¹²⁸ The language of the Act and the legislative history make clear that the crimes targeted by the Act are those that were the result of intentional acts by individuals with racial animus.¹²⁹ At the same time that they deploy this discourse of intentional racism, the Act’s supporters also quickly dispatch with any twenty-first century effects of this racism by evincing a discourse about the demise of racism in the United States.¹³⁰ Together these discourses produce a particular representation of the type of racial injustice that the law may be called upon to correct—in this case, an intentional racism that exists only in America’s past.

1. *A Discourse of Intentional Racism*

The Emmett Till Unsolved Civil Rights Crime Act and its accompanying legislative history place great emphasis on the evil of intentional racism. The

the urgent need for this measure.”); 154 CONG. REC. S9350 (daily ed. Sept. 24, 2008) (statement of Sen. Leahy) (“We must have a sense of urgency.”).

¹²⁶ See 154 CONG. REC. H5807 (daily ed. June 23, 2008) (statement of Rep. Lungren) (“Obviously, [these cases] are difficult to investigate and to prosecute because evidence has been lost or destroyed, witnesses and defendants have died, and memories have dimmed. We must act quickly to bring . . . long-overdue justice to these victims and their families.”).

¹²⁷ 154 CONG. REC. S9350 (daily ed. Sept. 24, 2008) (statement of Sen. Leahy).

¹²⁸ The Senate Report reflects this sentiment by highlighting that the investigation and prosecution of these murders are significant in so far as such efforts “restore[] the legitimacy of the criminal justice system upon which our democracy depends.” S. REP. NO. 110-88, at 6. Because the Act requires that the racism apparent in these crimes face legal scrutiny, the condemnation of a particular type of racism in the Act sends a message about appropriate conduct to society at large.

¹²⁹ See *infra* Part III.B.1.

¹³⁰ See *infra* Part III.B.2.

responsibilities of the Deputy Chief of the Criminal Section in the Civil Rights Division of the DOJ and the Supervisory Special Agent in the Civil Rights Unit of the FBI appointed by the Act make evident the importance of intent to the cases of racial injustice they can pursue.¹³¹ Both officials are limited to the coordination of cases that constitute violations of “criminal civil rights statutes.”¹³² The Act defines these statutes in part by reference to 18 U.S.C. § 241 (conspiracy against rights), 18 U.S.C. § 242 (deprivation of rights under color of law), 18 U.S.C. § 245 (federally protected activities), 18 U.S.C. §§ 1581, 1584 (peonage and sale into involuntary servitude), and 42 U.S.C. § 3631 (the Fair Housing Act).¹³³ Each of these laws carries an explicit intent requirement in order to prosecute the behavior outlined in the offense.¹³⁴ Thus, the racial violence condemned by the Act is explicitly linked to the intentional actions of individuals.

Beyond this explicit appeal to intentional racism, this discourse is also made apparent through the focus placed on individual perpetrators of racial injustice by proponents of the Act. One facet of this focus on individual perpetrators emerges from the centrality of seeking personal responsibility for these crimes. For supporters of the bill, calling out the individual racist actors who committed these brutal crimes was just as important as telling the stories of their victims. In his testimony for the Joint Hearing on the Till Bill, President of the Emmett Till Justice Campaign Alvin Sykes reserved his last comment to issue a threat to the perpetrators of these crimes:

[T]o the perpetrators who committed these deeds and thought that they got away with it long ago[, w]e strongly encourage you that once this bill is passed that you contact and retain attorneys, have your attorneys contact the prosecutors and start plea bargaining and making it easy on yourself because we are coming after all of you that are out there and we want to be able to bring you to the bar of justice. And for those that we don't get, we

¹³¹ Emmett Till Unsolved Civil Rights Crime Act of 2007, Pub. L. No. 110-344, §§ 3–4, 122 Stat. 3934–35 (2008).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ 18 U.S.C. § 241 (2006) (“with intent to prevent or hinder” the exercise of rights); *id.* § 242 (“whoever . . . willfully subjects any person . . . to the deprivation of any rights . . .”); *id.* § 245 (“whoever . . . by force or threat of force willfully injures . . .”); *id.* § 1581 (“with the intent of placing [an individual] in . . . condition of peonage . . .”); *id.* § 1584 (“whoever knowingly and willfully holds [an individual] to involuntary servitude . . .”); 42 U.S.C. § 3631 (“whoever . . . by force or threat of force willfully injures . . .”).

want you to die fearing that you are next.¹³⁵

Like Sykes, other supporters broadly expressed the sentiment that the Emmett Till Unsolved Civil Rights Crime Act would launch “the most exhausting manhunts in the history of our country to pursue those responsible for these acts.”¹³⁶ As its sponsors have suggested, the very purpose of the bill is to “finally track down those whose violent acts” went unpunished.¹³⁷ By underscoring the role of individual actors, these comments invoke a discourse of intentional racism.

Importantly, these individuals must be held to account for the racial animus that motivated their criminal actions, which further reinforces the discourse of intentional racism surrounding the Act. In his remarks in the week leading up to the vote on the Act in the Senate, Sen. Dodd clarified the Act was necessary to “bring justice to those who perpetrated these heinous crimes because of racial hatred.”¹³⁸ During the hearings in the House, Rep. Conyers offered an explicit connection between the individual actors and their motivating racial animus.¹³⁹ When he identified some of the individuals who have been held accountable since 1989 for their role in civil rights murders, Rep. Conyers attached a label to each that clearly expressed their racist hatred: “white supremacist Byron De La Beckwith,” “former Klan imperial wizard Sam Bowers,” and “former Klansman Bobby Cherry.”¹⁴⁰ Such labels suggest these individuals personally adopted a racist ideology that knowingly informed their actions in committing crimes that fall within the scope of the Act. This accountability for violent manifestations of personal racial hatred serves to reinforce the Act’s embrace of an overarching discourse of intentional racism.

In addition to calling out private individuals for their racist actions, the Act’s proponents acknowledge the connection between these individuals and government action in the denial of justice to the victims of civil rights

¹³⁵ *Joint Hearings*, *supra* note 16, at 62 (statement of Alvin Sykes, President of the Emmett Till Justice Campaign, Inc.). Sen. Dodd also called out the perpetrators, wishing that they “never, ever, ever, again enjoy a sleep-filled night.” 154 CONG. REC. S9353 (daily ed. Sept. 24, 2008) (statement of Sen. Dodd).

¹³⁶ 154 CONG. REC. S9353 (daily ed. Sept. 24, 2008) (statement of Sen. Dodd). Representative Lungren similarly expressed concern that these individuals must be held accountable as “the perpetrators of these crimes have been able to live in freedom so long.” *Id.* at H5807 (daily ed. June 23, 2008) (statement of Rep. Lungren).

¹³⁷ *Id.* at S7545 (daily ed. July 28, 2008) (statement of Sen. Leahy).

¹³⁸ *Id.* at S9353 (daily ed. Sept. 24, 2008) (statement of Sen. Dodd).

¹³⁹ *See Joint Hearings*, *supra* note 16, at 101 (statement of Rep. Conyers).

¹⁴⁰ *Id.*

murders.¹⁴¹ However, the stories told to garner support for the Act frequently reduced this collusion to the intentional acts of individual governmental actors, again resorting to a discourse of intentional racism.¹⁴² For example, in his prepared statement for the joint hearing, J. Richard Cohen, president of the Southern Poverty Law Center, noted that justice had failed to be served in these cases as a result of the “callous indifference” or “criminal collusion . . . of many white law enforcement officials in the segregated South.”¹⁴³ As an illustration, Cohen described the role of a white jailer and a white former deputy sheriff who were members of a lynch mob that stormed a jail cell holding an African-American man accused of raping a white woman, killing him three days before his trial in 1959 Mississippi.¹⁴⁴

In her testimony at the joint hearing, Rita L. Bender, the widow of Michael Schwerner, offered another example of government actors motivated by racial animus.¹⁴⁵ She shared her encounter at the trial of her husband’s killer with a middle-aged white Mississippi State Patrol officer, who described for her the “evil” pervasive in law enforcement at the time because “[he] knew very bad men who were a part of law enforcement in [Mississippi], and [he] knew very bad things.”¹⁴⁶ Although the complicity of

¹⁴¹ E.g., *Joint Hearings*, *supra* note 16, at 101 (statement of Rep. Conyers) (“Most shocking by today’s standards, State and local law enforcement colluded with the perpetrators of anti-civil rights violence. Attempts at justice often proved to be a charade and ended with jury nullification or tampering by racist citizens’ councils.”); S. REP. NO. 110-88, at 6 (2007) (“Many of these horrendous crimes were not just the results of criminal acts of private individuals but were a consequence of government actors who were complicit in the misconduct.”); see also Janis McDonald, *Heroes or Spoilers? The Role of the Media in the Prosecutions of Unsolved Civil Rights Era Murders*, 34 OHIO N.U. L. REV. 797, 804 (2008) (highlighting the role of the media in “mask[ing] the institutional cooperation in the violence that ensued, often supported, at least enabled by, institutions of local and national government.”).

¹⁴² The emphasis on intentional racism in this context is particularly troublesome because in some respects it serves to re-write history, suggesting that the effects of institutional and unconscious racism did not play a role in shaping the plight of African Americans during the civil rights era. For an analysis of a more systemic perspective of the government’s role in shaping race relations in this time period, see DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 42–59 (1993) (describing facially neutral government policies that served to construct and preserve racial segregation in American cities).

¹⁴³ *Joint Hearings*, *supra* note 16, at 55 (statement of J. Richard Cohen, President of the Southern Poverty Law Center).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* (statement of Rita L. Bender).

¹⁴⁶ *Id.*

the government in these cases is often ascribed to individual racist actors,¹⁴⁷ the supporters of the Act do make some vague references that could be suggestive of more systemic, institutionalized racial injustice. The Senate Report alleges that “state and federal government also bear responsibility for the *racial climate* that allowed individual racially motivated hate crimes to flourish.”¹⁴⁸ Similarly, Sen. Dodd somewhat ambiguously identified an “atmosphere” in the workings of the legal system that discouraged African Americans from testifying in these murder cases.¹⁴⁹ Whether these allegations amount to anything more than the presence of racially motivated actors in positions of governmental power remains obscured without any greater detail. As a result, these claims do little to introduce a discourse of racism beyond that attributed to the intentional acts of individuals.

2. *A Discourse of Racial Progress (or the Death of Racism)*

Another important discourse concerning racism that emerges in the narrative of racial injustice told through the Emmett Till Unsolved Civil Rights Crime Act is the notion that legally actionable racism is a thing of the past. In her work unveiling the politics of civil rights, critical race theorist Kimberlé Williams Crenshaw has uncovered a discourse of racial progress that she argues diminishes the continuing struggle to obtain true racial equality.¹⁵⁰ She argues that political discourse frequently reflects a view that “the goal of the civil rights movement—the extension of formal equality to all Americans regardless of color—has already been achieved, hence the vision of a continuing struggle under the banner of civil rights is inappropriate.”¹⁵¹

As a necessary corollary to the discourse of racial progress, critical race theorists also identify a discourse of racism that views it as an “isolated,

¹⁴⁷ There is even some suggestion to this effect surrounding former FBI Director J. Edgar Hoover, who failed to deliver information to the attorneys at the Justice Department regarding the FBI’s extensive investigation into the 1963 church bombing that killed four little girls in Birmingham, Alabama. *Joint Hearings, supra* note 16, at 46 (statement of G. Douglas Jones, Esq., Birmingham, Alabama); S. REP. NO. 110-88, at 7 (2007).

¹⁴⁸ S. REP. NO. 110-88, at 6 (emphasis added).

¹⁴⁹ 154 CONG. REC. S9353 (daily ed. Sept. 24, 2008) (statement of Sen. Dodd).

¹⁵⁰ See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 103, 106 (Kimberlé Crenshaw et al. eds., 1995) (“[T]he societal adoption of a racial equality rhetoric does not itself entail a commitment to end racial inequality.”) [hereinafter Crenshaw, CRITICAL RACE].

¹⁵¹ *Id.* at 106.

waning phenomenon, soon to succumb to legal tools promoting equality.”¹⁵² One way these discourses get expressed is through “creating a break with the past” such that it appears that any “present inequities cannot be the result of discriminatory practices because this society no longer discriminates against” people of color.¹⁵³ The passage of the Emmett Till Unsolved Civil Rights Crime Act is rife with attempts by its supporters to distance contemporary U.S. culture (and the criminal justice system) from the racial injustices of the past. As a result, these efforts signal that legally actionable racism is only identifiable in America’s past.

While fairly common in legislation that authorizes appropriations, the sunset provision in the Emmett Till Unsolved Civil Rights Crime Act plays a role in communicating a discourse of racial progress. In accordance with its sunset provision, the Act (and its authorizations) will expire in 2017.¹⁵⁴ The discussion of this provision during the joint hearing in the House of Representatives illustrates its function in distancing contemporary U.S. culture from the existence of racial injustice. Representative Steve King (R-Iowa) found it imperative to clarify that at some point “it won’t be necessary to have this legislation that goes on and perpetuates itself” because there will either be a “biological solution” (read: death) or a legal solution for these perpetrators.¹⁵⁵ The importance he placed on making this point—that the Act could play no role in the future—suggests at the very least a sense of “progress” in the achievement of equal justice, but also implies that the need to target racism legislatively will also have run its course.

The supporters of the Act similarly break ties with the past by describing the racial injustice caused by the Act as a “stain” on America’s history and democratic ideals.¹⁵⁶ The use of this terminology connotes that racism as

¹⁵² MATSUDA, *supra* note 22, at 52.

¹⁵³ Crenshaw, CRITICAL RACE, *supra* note 150, at 107.

¹⁵⁴ Emmett Till Unsolved Civil Rights Crime Act of 2007, Pub. L. 110-344, § 8, 122 Stat. 3934 (2008).

¹⁵⁵ *Joint Hearings*, *supra* note 16, at 36 (statement of Rep. Steve King). Interestingly, King also felt it important to emphasize that despite the title of “Civil Rights” the “kind of raced-based crimes” covered by the Act “can work in either direction.” *Id.* His statement serves to diminish any sense that racial injustice disproportionately defines the experience of people of color.

¹⁵⁶ *E.g.*, *Joint Hearings*, *supra* note 16, at 12 (statement of Rep. Nadler) (calling Congress to take on the goal of “cleansing our society of this great stain.”); 154 CONG. REC. S9354 (daily ed. Sept. 24, 2008) (statement of Sen. Dodd) (“[W]e want to remove the great stain on our justice system . . .”); Drew Jubera, *Civil Rights-Era Murder Cases: “Another Day For Justice,”* ATLANTA J.-CONST., June 3, 2007, at A1, reprinted in 154 CONG. REC. S8018 (daily ed. Aug. 1, 2008) (quoting spokeswoman for Rep. Lewis that these crimes “left an intolerable stain on our democracy.” (internal quotation marks omitted)).

condemned by the Act is not an ongoing problem requiring legal action, but a historical aberration in the criminal justice system that has been allowed to “set in” through lack of action. For the supporters of the Act, racism is a thing of the past, and the crimes targeted by the Act are a “part of America’s history and America is what it is today because of the sacrifices of many great men and women.”¹⁵⁷ According to Sen. Dodd, confronting these crimes allows us “to write a hopeful postscript in the struggle for racial equality in our Nation”¹⁵⁸ Others have also ascribed the need for this legislation to the fact that “African-American citizens were not protected for much of our history,” which suggests that these citizens today have adequate protection under the law.¹⁵⁹

Such sentiments not only distance legally actionable racism from racial disparities present in America today, but also underscore a discourse of racial progress that suggests racially motivated violence and racial injustice in the legal system have diminished completely.¹⁶⁰ Sen. Patrick Leahy has almost directly stated as much: “We have made great progress in the last few decades towards achieving equal justice under law.”¹⁶¹ Ultimately, the narrative of racial injustice that comes out of the Emmett Till Unsolved Civil Rights Crime Act is that legally actionable racism is recognizable only as “scars on our history.”¹⁶² By emphasizing that the Act is meant to play a significant role in “closing a grim chapter in our nation’s history,” its supporters appeal to a discourse of racial progress that diminishes the perpetuation of racial injustice today and the continued need for racial equality.¹⁶³

¹⁵⁷ 154 CONG. REC. H5811 (daily ed. June 23, 2008) (statement of Rep. Lungren).

¹⁵⁸ *Id.* at S9354 (daily ed. Sept. 24, 2008) (statement of Sen. Dodd).

¹⁵⁹ S. REP. NO. 110-88, at 2 (2007).

¹⁶⁰ Richard Cohen, President of the Southern Poverty Law Center, has warned of such danger: “The problem with hate crime cases is they can’t be a substitute for a wider civil-rights agenda. . . . At the same time, those cases can’t serve as a substitute for doing justice in our time.” Jerry Mitchell, *Obama First to Implement Till Bill*, CLARION LEDGER, Dec. 1, 2008, <http://pqasb.pqarchiver.com/clarionledger/access/1740272061.html?FMT=ABS&date=Dec+01,+2008>.

¹⁶¹ 154 CONG. REC. S9351 (daily ed. Sept. 24, 2008) (statement of Sen. Leahy).

¹⁶² *Joint Hearings*, *supra* note 16, at 52 (statement of J. Richard Cohen, President and CEO, Southern Poverty Law Center).

¹⁶³ *Id.* at 101 (statement of Rep. Conyers).

C. Constructing a Narrative of Racial Injustice for the Criminal Justice System

The discourses that emerge from the Emmett Till Unsolved Civil Rights Crime Act and its legislative history cumulate into a narrative that works to fortify a “majoritarian mindset” about what constitutes racial injustice in the eyes of law.¹⁶⁴ When the government “advocate[s] . . . a certain racial policy or practice,” it is attempting to sketch out appropriate race relations (either implicitly or explicitly).¹⁶⁵ In the instance of the passage of this Act, the government has launched an attack on the narrative of racial injustice constructed by its internal discourses—a narrative detailing the last remaining strains of intentional racism that occurred in our nation’s not-so-recent past, committed against innocent individuals caught up in the struggle for civil rights.¹⁶⁶ Assessing the implications of this narrative when taken as a whole provides a greater understanding of how it simultaneously vilifies one experience of racial injustice while dismissing others.¹⁶⁷

One way the Act’s narrative of racial injustice undermines other experiences of racial inequality is through emphasizing “individual instances of racial discrimination.”¹⁶⁸ The focus on “individual instances” of racial injustice is apparent in the showcasing of the stories of the innocent and heroic victims of racial violence like Emmett Till, but also in the attention placed on the individual perpetrators of intentional racism the Act is intended to target.¹⁶⁹ Putting forth the experience of racism on a more individualized basis functions as a way to mask broader systemic problems, such as the institutionalization of racial dominance and subordination, that can also negatively impact the lives of people of color.¹⁷⁰ “The individual framing of

¹⁶⁴ See Delgado & Stefancic, *Bibliography*, *supra* note 26, at 462. Certainly the Act does not stand alone in this process, but works alongside other discourses both inside and outside the law, which work to constantly reproduce similar narratives of racial justice.

¹⁶⁵ Howard Winant, *Racism Today: Continuity and Change in the Post-Civil Rights Era*, 21 *ETHNIC & RACIAL STUD.* 755, 756 (1998).

¹⁶⁶ See *supra* Part III.B.1–2.

¹⁶⁷ These simultaneous effects of the narrative are similar to what Richard Delgado and Jean Stefancic describe as structural determinism, which emphasizes how available cultural messages about racism restrict what in turn can be perceived as racism. DELGADO & STEFANCIC, *INTRODUCTION*, *supra* note 24, at 25–30. “Once the structure of law and legal categories is set, it replicates itself much as, in the world of biology, DNA enables organisms to replicate.” *Id.* at 27.

¹⁶⁸ Powell, *supra* note 47, at 794.

¹⁶⁹ See *supra* Parts III.A, III.B.1.

¹⁷⁰ See BONILLA-SILVA, *supra* note 78, at 35–36. Howard Winant specifically attributes the post-civil rights era return to this more individualizing narrative of racism to neoconservatism, as a way of “deliberately restrict[ing] . . . attention to injury done to

the question of racism misdirect[s] our attention . . . [and fails to] account for the ways in which policies produce foreseeable . . . racial harms.”¹⁷¹ Furthermore, this individualizing perspective preempts the need to consider “group-based” remedies by reducing the problem-solving framework for issues of racism to a “case-by-case” basis.¹⁷² As a result, this narrative of racial injustice ignores the ways in which broader cultural patterns and institutional practices ultimately serve to perpetuate racial inequality.¹⁷³

The Act’s narrative of racial injustice further downplays the significance of other experiences of racism by naturalizing the existence of present-day racial inequities.¹⁷⁴ This narrative suggests there is little need to pursue racism in today’s criminal justice system, as it views any such problems of racism as a part of America’s unfortunate history.¹⁷⁵ In treating racism as largely an “artifact of the past,” this narrative ultimately renders modern-day racism “invisible and marginalized.”¹⁷⁶ While this sense of resolution of America’s racial “problems” may accord whites some comfort, the adoption of such a narrative of racial injustice in the law makes it increasingly “difficult for [people of color] to name their reality,” particularly when they feel the racialized effects of actions, events, and conditions that cannot be attributed to a “clearly identifiable discriminator.”¹⁷⁷ The consolidation of governmental power around this particular narrative of racial injustice through the passage of the Act serves to “downplay the continuing significance of race in American society” in such a manner that ultimately serves a broader racial project of “mask[ing] underlying racial conflicts.”¹⁷⁸

the individual as opposed to the group, and to advocacy of a ‘colour-blind’ racial policy.” Winant, *supra* note 165, at 759.

¹⁷¹ powell, *supra* note 47, at 794.

¹⁷² See *id.* at 795–96. Susan Bandes has described this individualizing framework for understanding racial inequality as the “anecdotalizing” of racialized harm. Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1287 (1999). A central concern arising out of this conceptualization of racial harm is that “anecdotes, divorced from any larger context and uninformed by empirical data, will unduly influence the development of legal policy.” *Id.* at 1314; see Gupta, *supra* note 24, at 2070 (describing the American criminal justice system as “a criminal justice system whose subjugation of people of color is contingent upon individualizing all cases”).

¹⁷³ See powell, *supra* note 47, at 795.

¹⁷⁴ See Winant, *supra* note 165, at 760–61 (“Today, a racial project can be defined as racist if it creates or reproduces a racially unequal social structure, based on essentialized racial categories; if it essentializes or naturalizes racial identities or significations, based on a racially unequal social structure; or both.”); see also *id.* at 816.

¹⁷⁵ See *supra* Part III.B.2.

¹⁷⁶ Winant, *supra* note 165, at 759.

¹⁷⁷ Crenshaw, CRITICAL RACE, *supra* note 150, at 106–07.

¹⁷⁸ OMI & WINANT, *supra* note 34, at 152.

The narrative told through the Emmett Till Unsolved Civil Rights Crime Act prescribes a very limited vision of racial justice for the twenty-first century. As an embodiment of this entire narrative, the law recognizes the significance of individualized experiences of racism in the criminal justice system from America's past. However, it also works simultaneously to legitimize other racial disparities that currently exist in the criminal justice system that cannot be explained by the actions of a "bad" or "racist" individual.¹⁷⁹ The failure to address these other forms of racial inequality through the law ultimately serves to reinforce a status quo that naturalizes the effects of institutional and unconscious racism.¹⁸⁰ However, this narrative reflects more than just a battle between competing discourses of racism,¹⁸¹ but in fact has the ability to shape the lived realities of people of color in material ways.¹⁸²

IV. THE MAKING OF A COLD CASE: THE MATERIAL EFFECTS OF A LIMITED NARRATIVE OF RACIAL INJUSTICE

By offering a limited vision of racial justice for the twenty-first century, the Emmett Till Unsolved Civil Rights Crime Act does important cultural work in maintaining the status quo in a racialized criminal justice system. Through its lens, racial disparities in handing down criminal justice are only significant when they result from the intentional actions of individuals motivated by their racial animus, particularly against innocent victims in the struggle for civil rights. In his remarks on the Act, Senator Leahy stated that this law reflected "the depth of our commitment" as a nation to equal justice under the law.¹⁸³ However, in light of the Act's narrative of racial injustice, this commitment certainly does not dig deep enough to unearth the racism that lurks throughout the criminal justice system. Rather this narrative serves to bury it further by erasing racial injuries and labeling racial disparities as the natural consequence of operating an effective and colorblind criminal justice system.

¹⁷⁹ See ROSE, *supra* note 39, at 166; Weiss & Wodak, *supra* note 39, at 15.

¹⁸⁰ See OMI & WINANT, *supra* note 34, at 130 (arguing that the rearticulation of what constitutes racial equality works in the "maintenance of existing social positions and political stability").

¹⁸¹ *Id.* at 70 (discussing the "contested[] meanings of racism").

¹⁸² See *infra* Part IV.

¹⁸³ 154 CONG. REC. S9351 (daily ed. Sept. 24, 2008) (statement of Sen. Leahy).

A. *Who Are the Innocent Victims of Disproportionate Incarceration?*

Perhaps one of the most alarming disparities among racial groups in the United States today is the differential incarceration rate of African Americans and whites. African-American men face a 32% chance of spending time in prison at some time in their lives, while white men have only a 6% chance of such outcome.¹⁸⁴ The population of America's prisons and jails is overwhelmingly minority, with African Americans and Latinos constituting 60% of inmates in 2008.¹⁸⁵ The incarceration rate for whites is 412 per 100,000 residents, which is substantially lower than the rate of 2290 per 100,000 residents for African Americans.¹⁸⁶ When assessed on the state-by-state level, even the lowest state incarceration rate for African Americans (Hawaii with 851 per 100,000 residents) is still 15% higher than the state with the highest rate for whites (740 per 100,000 residents).¹⁸⁷ Of the nearly 2.1 million inmates in federal and state prisons or local jails as of June 2008, more than 910,000 were African American.¹⁸⁸ When considering that African Americans comprise only thirteen percent of the entire United States population, the fact that they represent almost half of the inmates in the United States forecasts a bleak future for racial equality at the outset of the twenty-first century.¹⁸⁹

Unlike the uneven justice delivered to the families of victims of racially motivated murders during the civil rights era, this racial disparity in incarceration rates lacks resonance for most American lawmakers and much of the public at large. For many, these numbers reflect no disparity at all, but accurately assess and protect against a high crime rate and the pathological criminality of African Americans.¹⁹⁰ This mentality is evidenced by the continuing explosion in incarceration rates since the 1970s and the tough-on-

¹⁸⁴ THE SENTENCING PROJECT, FACTS ABOUT PRISONS AND PRISONERS (2009), http://www.sentencingproject.org/doc/publications/publications/inc_factsaboutprisons_Dec2009.pdf.

¹⁸⁵ *Id.*

¹⁸⁶ See MAUER & KING, *supra* note 62, at 4.

¹⁸⁷ *Id.* at 7.

¹⁸⁸ See HEATHER C. WEST & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2008—STATISTICAL TABLES 17 tbl.16 (2009), <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim08st.pdf>.

¹⁸⁹ MARC MAUER, THE SENTENCING PROJECT, RACE TO INCARCERATE 137 (2006).

¹⁹⁰ See *id.* at 20–23; Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 264 (2007) (“[B]lackness itself is seen as a mark of criminality.”) [hereinafter *Roberts, Racial Bias*].

crime rhetoric that has permeated mainstream politics since the 1980s.¹⁹¹ In addition to the naturalization of these disparities as mere costs of an effective criminal justice system, one reason the glaring nature of these racial disparities lacks salience is an inability to associate the disparity with any legitimate victims of racism. According to the narrative of racial injustice offered by the Emmett Till Unsolved Civil Rights Crime Act, the victims of disproportionate incarceration are not victims at all, but criminals. Incarcerated people of color do not reflect the narrative's sympathy for innocent and heroic victims. As a result, victims of these racial disparities are effectively denied any relief because their stories cannot be accorded the label of "racial injustice" as it is written by Congress and adopted in public discourse on race.

Some might argue that such a narrative of racial injustice does not unfairly proscribe sympathy for the plight of incarcerated people of color. Presumably, the "would-be" victims of these disparities have in fact committed a crime and thus, the narrative rightly elides the existence of any racial injury. However, one major problem with this rationale is that differential rates of criminal activity cannot adequately account for the differential rates of incarceration for people of color.¹⁹² As Marc Mauer, executive director of The Sentencing Project, has shown, "changes in criminal justice policy, rather than changes in crime rates, have been the most significant contributors leading to the rise in state prison populations" since the 1970s.¹⁹³ This research suggests that the culpability of certain behavior (including non-violent property crimes and drug crimes) has evolved over time, rendering criminality itself a matter of social construction.¹⁹⁴

This social construction of criminality is intimately tied to the social construction of racial difference.¹⁹⁵ Perhaps the most prominent example of this connection is the 100-to-1 crack-powder cocaine disparity in federal drug sentencing with African Americans making up approximately 90% of crack users.¹⁹⁶ Such connections between racial difference and criminal

¹⁹¹ MAUER, *supra* note 189, at 28–35, 55–91.

¹⁹² *See id.* at 138–56. Mauer suggests that law enforcement priorities and sentencing legislation in addition to crime rates play a role in shaping racial disparities in incarceration. *Id.* at 141.

¹⁹³ *Id.* at 33.

¹⁹⁴ *See id.*

¹⁹⁵ R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 598 (2003) ("[I]ncarceration plays a role in constructing the meaning of race in American society by defining race and crime in terms of each other.").

¹⁹⁶ DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 8 (1999). On April 29, 2009, the Senate Committee on the Judiciary,

sanctions can be understood as a form of reinscribing racial difference by predominantly white politicians who “impose the most serious criminal sanctions on conduct in which they and their constituents are least likely to engage.”¹⁹⁷ From this understanding, “public perception of the appropriate societal response [to such drug use] was shaped by the composition of the user population.”¹⁹⁸

The use of racial profiling provides another example of the interconnectedness between creating racial difference and defining criminality. While searches of white drivers are four times more likely to produce criminal evidence than those of African-American drivers, consent searches are disproportionately targeted at people of color on the road.¹⁹⁹ The end result is to constantly reproduce and concretize the association between African Americans and criminality as a function of social reality through a particular outcome—the disproportionate incarceration of African Americans.²⁰⁰ Thus, as illustrated by these examples, innocence, like criminality, is not defined in isolation from racial difference, and as such artificially preempts incarcerated individuals from being understood as victims of racial injustice.

Regardless of this challenge to the relative lack of innocence among the inmates who are the victims of disproportionate incarceration, there are other reasons to believe that the relationship between race and incarceration is suspect, suggesting that such individuals are the victims of a racial injustice worthy of public and legal intervention. David Cole argues that the criminal justice system relies on already existing racial and class inequalities as a way of doling out constitutional protections in terms of double standards.²⁰¹ Thus, people of color disproportionately bear the costs of the system (through disproportionate incarceration), while whites are insulated from feeling or even recognizing this burden.²⁰² Rather than simply exploiting background

Subcommittee on Crime and Drugs conducted a hearing specifically addressing the crack-powder disparity in federal sentencing. Press Release, Sen. Comm. on the Judiciary, Notice of Subcommittee Hearing (Apr. 22, 2009), <http://judiciary.senate.gov/hearings/hearing.cfm?id=3798>.

¹⁹⁷ COLE, *supra* note 196, at 8.

¹⁹⁸ MAUER, *supra* note 189, at 149. This is in sharp contrast to the reduction in penalties for marijuana usage that accompanied the rise in its usage by white, middle-class youth during the 1960s and 1970s. *Id.*; COLE, *supra* note 196, at 8.

¹⁹⁹ MAUER, *supra* note 189, at 142.

²⁰⁰ See Banks, *supra* note 195, at 598.

²⁰¹ See COLE, *supra* note 196, at 7, 31 (“The current system creates two Fourth Amendments—one for people who are aware of their right to say no [to consent searches] and confident enough to assert that right against a police officer, and another for those who do not know their rights or are afraid to assert them.”).

²⁰² See *id.* at 55.

inequality, Dorothy Roberts looks to the history of incarceration in order to illustrate its connection to the maintenance of racial inequality.²⁰³ Roberts points to the adaptation of southern prisons after Emancipation in taking over former plantations and utilizing convict leasing programs to “extract[] the labor of formerly enslaved blacks” while maintaining the economic and political superiority of poor whites.²⁰⁴ This evidence supports viewing “mass imprisonment of African Americans . . . as a state measure to supervise citizens en masse on the basis of race” rather than as an effort to control crime or dole out justice.²⁰⁵

Even if these perspectives highlighting the severity of the racial injustice accomplished through racial disparities in incarceration are not persuasive enough to challenge the legitimacy of an “innocent victim” requirement in any narrative of racial injustice, there are still innocent victims to consider beyond the inmates themselves. Poor communities of color also suffer the injustice of disproportionate incarceration with the cycling of offenders in and out of the system and in and out of communities.²⁰⁶ One effect of this cycle is the damage done to the social networks of these communities.²⁰⁷ Not only do the families of the incarcerated experience “an immediate and financial social strain,” but also long-term struggles to maintain family ties and cope with the stigma, burdens which disproportionately fall on female caregivers.²⁰⁸ Children with incarcerated parents face “feelings of shame, humiliation, and a loss of social status.”²⁰⁹ Moreover, changes in their economic circumstances in conjunction with the lack of family stability and social role-modeling often set these children up to become the “next generation of offenders.”²¹⁰

However, the damage to social networks is not limited to immediate families, but also places a strain on “extended networks of kin and friends that have traditionally sustained poor African-American families in difficult times, weakening communities’ ability to withstand economic and social hardship.”²¹¹ The damage done to these social networks can “ultimately

²⁰³ See Roberts, *Racial Bias*, *supra* note 190, at 267–72.

²⁰⁴ *Id.* at 268.

²⁰⁵ *Id.* at 271.

²⁰⁶ MAUER, *supra* note 189, at 202.

²⁰⁷ Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1281 (2004) [hereinafter Roberts, *Mass Incarceration*].

²⁰⁸ *Id.* at 1282.

²⁰⁹ MAUER, *supra* note 189, at 204.

²¹⁰ *Id.*

²¹¹ Roberts, *Mass Incarceration*, *supra* note 207, at 1282.

reduce [their] collective efficacy” in maintaining the safety of their communities.²¹² Moreover, the underlying policies that give rise to racial disparities in incarceration also negatively affect poor communities of color by subjecting them to intense surveillance through racial profiling and other efforts of the War on Drugs. These devastating effects on communities and families of the incarcerated are not unlike those faced by the families and communities of the victims of unsolved civil rights crimes. Both have faced the uneven justice of criminal law as well as an inability to safeguard their communities from violence. While the communities of victims lost to racially motivated murders during the civil rights era faced the penetration of white supremacist violence often through the collusion of law enforcement, the communities of present-day victims of disproportionate incarceration are drained of resources from within to combat the deterioration of norms around criminality and the proscription of violence.²¹³ In light of these similarities, the emphasis placed on the innocence of victims when measuring racial injustice according to the dominant narrative may accommodate the families and communities of those incarcerated, if not the incarcerated themselves.

B. Victims in a New Struggle for Civil Rights

The narrative of racial injustice offered by the Emmett Till Unsolved Civil Rights Crime Act also implicates the historical struggle of African Americans to access their political and civil rights in defining who counts as a victim of racial injustice. As African Americans have acquired more formal, and even substantive, access to political and civil rights since the 1960s²¹⁴ and with an African-American president presently in the White House, some would argue that the quest for these rights has come to end, foreclosing a central justification for continuing to question racial inequality. However, thirteen percent of African-American men have lost the right to vote across the United States (and in some states, one in three or one in four African-American men have lost this right), as a result of felony disenfranchisement laws.²¹⁵ Forty-eight states and the District of Columbia

²¹² *Id.* at 1287.

²¹³ *See id.* at 1286–87.

²¹⁴ The Voting Rights Act of 1965 (and other legislation to eradicate poll taxes, literacy tests, and grandfather clauses) as well as the protections in public accommodations and employment offered by the Civil Rights Act of 1964 in many ways are the defining moments of the civil rights movement in the public memory.

²¹⁵ JAMIE FELINER & MARC MAUER, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1–2 (1998), http://www.sentencingproject.org/doc/File/FVR/Fd_losingthevote.pdf; THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1–2 (2008),

have all passed laws preventing felons from voting while they are incarcerated, and eleven states have laws that can deny the right to vote to offenders even after having served their term.²¹⁶ These laws ultimately have resulted in the temporary or permanent loss of the right to vote for 5.3 million Americans.²¹⁷

If this evidence alone is not enough to suggest that the victims of racial disparities in incarceration are also, like their civil rights era counterparts, caught up in a struggle to exercise basic and fundamental rights, then an assessment of the political impact of this disenfranchisement on African-American communities is significant. Because of the geographic concentration of rates of incarceration in poor African-American communities, the effect of such laws can be to disenfranchise whole communities as well as to dilute African-American political power particularly at the local level, but also at the national level.²¹⁸ Moreover, the adoption (and fine-tuning) of felony disenfranchisement laws is closely linked to efforts in the South during the late nineteenth and early twentieth centuries to disenfranchise African Americans specifically by writing them “to include crimes blacks supposedly committed more frequently than whites.”²¹⁹

From this historical and political perspective, one of the central objects of the civil rights movement, to eliminate racialized barriers to the vote created in response to Reconstruction, is still ongoing. In fact, some scholars argue that racial disparities in incarceration are the specific effects of policies of mass incarceration and felony disenfranchisement, which are themselves a part of a modern-day Jim Crow system to maintain (as well as to obscure) a racial caste system in the United States.²²⁰ The stigma of incarceration, in addition to preventing access to the vote, also inhibits many formerly incarcerated individuals from entering the labor market, seeking out greater education and job skills, and accessing other resources necessary to become a productive citizen.²²¹ Limiting access to a narrative of racial injustice to only those racial injuries associated with the historic civil rights movement elides the current struggle of African Americans to gain substantive equality, not only in terms of political and civil rights, but also in terms of economic and

<http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=335>
[hereinafter FELONY DISENFRANCHISEMENT].

²¹⁶ FELONY DISENFRANCHISEMENT, *supra* note 215, at 1.

²¹⁷ *Id.*

²¹⁸ Roberts, *Mass Incarceration*, *supra* note 207, at 1292–93.

²¹⁹ FELNER & MAUER, *supra* note 215, at 3.

²²⁰ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 1–2 (2010).

²²¹ Roberts, *Mass Incarceration*, *supra* note 207, at 1293–97.

social survival. This current struggle for civil rights compels the inclusion of victims of racial disparities implicated by this struggle in the numbers of those who “count” as victims of racial injustice in the public discourse.

C. If There’s No Perpetrator, Is It Really Racism?

Another significant limitation of the narrative of racial injustice represented in the Emmett Till Unsolved Civil Rights Crime Act is the focus on individual discriminatory actors and intentional racism. In only very rare and exceptional cases, can racial disparities in the criminal justice system be pinned down as the result of the actions of police, prosecutors, judges, and jurors who consciously and intentionally act upon their racial animus.²²² This limitation inhibits the pervasive effects of institutional and unconscious racism from entering the public discourse as evidence of racial injustice. Without regard to intent, racism plays a foundational role in the construction and maintenance of the criminal justice system in “how crimes are defined, how suspects are identified, how charging decisions are made, how trials are conducted, and how punishments are imposed.”²²³ While race may not play an explicit role in shaping the criminal justice system, the formulation of crimes and the enforcement of those crimes “reinforces the political identity . . . of the original citizen body whose genesis was the original exclusionary constitution . . . of the American state.”²²⁴ In other words, the criminal justice system is a site for creating and recreating who counts as a citizen according to a definition of citizenship that built in the exclusion of people of color from its inception.

As a result, racial difference is always at stake even in seemingly neutral policies and practices of the criminal justice system.²²⁵ For example, in *United States v. Drayton*, the Supreme Court held that the Fourth Amendment does not require police officers to advise passengers on a bus that they have the right to refuse to answer questions and to refuse consent to searches.²²⁶ The touchstone of such consensual encounters between civilians and the police is whether “a reasonable person would feel free to terminate

²²² And even when such actions can be shown, doubt is cast upon the degree to which such animus actually played a role in the decision making as seen in the case of Mark Fuhrman’s testimony in the O.J. Simpson trial. See Lipsitz, *supra* note 58, at 21–23.

²²³ Roberts, *Racial Bias*, *supra* note 190, at 262.

²²⁴ KATHERINE IRENE PETTUS, *FELONY DISENFRANCHISEMENT IN AMERICA* 171 (Marilyn McShane & Frank P. Williams III eds., 2005).

²²⁵ This is also evidenced in the discussion of the social construction of criminality in Part IV.A.

²²⁶ 536 U.S. 194, 203 (2002).

the encounter.”²²⁷ The ruling of the Court means that a reasonable person would not require the advisement of a police officer before feeling free to walk away from the police. While this ruling, one in a line of many authorizing lax controls on police officers in the course of consent searches, makes no specific appeal to race, it nonetheless serves to recreate racial difference in the criminal justice system by affording protections to those who do not fear police encounters (whites) or “citizens” and denying them to those who do (people of color) or “non-citizens.”²²⁸ When viewed through this lens of institutional racism, the sanctioning of consent searches becomes a palpable source of racial inequality worthy of reform.

In addition to the operation of institutional racism in the design and function of the criminal justice system, the actors who implement the system can also be implicated in creating racial injustice without regard to any intent or racial animus. A primary example of the effects of unconscious racism comes out through the role of discretionary actors in enforcing the criminal justice system. For example, in the landmark case of *McKleskey v. Kemp*, an African American who received the death penalty for murdering a white police officer in Georgia brought forth a case study by David C. Baldus demonstrating that racial considerations played a role in death penalty sentencing in that state.²²⁹ While none of the evidence suggested that prosecutors intended to create racial disparities, the Baldus study showed that prosecutors were more likely to pursue the death penalty for African Americans with white victims than whites with African-American victims.²³⁰ While ultimately unpersuasive to the Court because of the lack of intentional discrimination, the data suggests that the discretionary decision of whether to pursue the death penalty is imbued with internalized racial difference.²³¹ Without the benefit of the framework of unconscious racism, decision making occurring on the basis of race does not exist to give rise to any racial injustice and thus, racial disparities among the inmates sitting on death row do not require any remediation.

The frameworks of institutional and unconscious racism provide a basis for understanding the depth of racial injustice in the criminal justice system. The narrative of the Emmett Till Unsolved Civil Rights Crime Act targets one limited form of racial injustice (intentionally racist acts perpetrated against innocent and heroic victims of the historic civil rights movement), while at the same time claiming “to write a hopeful postscript in the struggle

²²⁷ *Id.* at 201.

²²⁸ See COLE, *supra* note 196, at 26–27; PETTUS, *supra* note 224, at 171–72.

²²⁹ 481 U.S. 279, 286 (1987).

²³⁰ *Id.* at 286–88.

²³¹ *Id.* at 287 n.5.

for racial equality in our Nation.”²³² From this perspective, the United States has attained racial equality and any evidence to the contrary (the unsolved murders of civil rights workers, the racial disparity in incarceration, etc.) can only be afforded a “postscript” of our nation’s resources in seeking remedy. Without a place in the dominant narrative of what constitutes racial injustice as reinscribed by the Emmett Till Unsolved Civil Rights Crime Act, racial disparities in the criminal justice system are simply not significant enough to require legal intervention, no matter how devastating or pervasive their impact. In fact, these disparities simply become naturalized—a normal cost of operating a criminal justice system. David Cole suggests that without the normalization of the racial disparities in the criminal justice system, the United States could not “afford the policy of mass incarceration that we have pursued over the past two decades.”²³³ The implication is that if the same numbers of whites were facing imprisonment as faced by African Americans, the public outrage against the system would lead to comprehensive reform. Thus, unless we extend the “depth of our commitment” as suggested by Sen. Reid to reach the racism at the root of these disparities, “we will have ‘no equal justice.’”²³⁴

V. CREATING A MORE COMPREHENSIVE NARRATIVE OF RACIAL INJUSTICE

Rather than looking to the past to create a narrative of racial injustice, Congress must enact legislation that creates and enforces a vision of racial justice that expresses national responsibility for the devastating effects of institutionalized and unconscious racism such as the mass incarceration of people of color and felony disenfranchisement. As evidenced by the limitations of the narrative embraced by the Emmett Till Unsolved Civil Rights Crime Act, a focus on intentional racism against innocent victims effectively buries the continuing significance of racial inequality in structuring and preserving the criminal justice system. While directing funds to the resolution of nearly half a century’s old cold cases under the Act may improve the image of the criminal justice system superficially, those funds would prove more useful in substantively crafting equal justice for all Americans.

²³² 153 CONG. REC. S1788 (daily ed. Feb. 8, 2007) (statement of Sen. Dodd).

²³³ COLE, *supra* note 196, at 5.

²³⁴ *Id.* at 9.

A. *Shifting the Locus of Power in the Criminal Justice System*

One approach to changing the narrative of racial injustice to deal with the effects of institutional and unconscious racism is to enact legislation that shifts power over the criminal justice system into those communities most affected—poor, urban communities of color. Placing local communities in the role of mediator between the criminal law and law enforcement may serve to moderate racial inequality in the criminal justice system.²³⁵ One way to accomplish this shift is to increase funding to urban police forces in conjunction with implementing community policing initiatives.²³⁶ Such funds can place more cops on the streets to even out enforcement in urban communities between drug crimes and violent felonies, which can counteract the racial disparities in incarceration.²³⁷ These funds can also be utilized to implement “culturally-specific orientation training” for officers working with primarily minority constituents to help bring together these groups in meaningful ways.²³⁸ Meanwhile, increased emphasis on community policing can build “police-community relationships and proactively address problems” by actively constructing what justice means for their community²³⁹ and developing alternatives to arrest for problems for which it is inappropriate.²⁴⁰

Another method for improving local governance over the criminal justice system is to increase the importance of locally selected juries in the enforcement of criminal law.²⁴¹ Federal and state policies that encourage more jury trials and discourage widespread plea-bargaining practices work to remove power from prosecutors (who are frequently elected by suburban voters) and redistribute it to members of the communities most affected by crime.²⁴² Professor William Stuntz further suggests that freedom to interpret substantive criminal law should also rest with juries by allowing the crimes most frequently prosecuted to be judged by jurors in a manner that allows

²³⁵ William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2031–32 (2008).

²³⁶ *Id.* at 2032–34.

²³⁷ *Id.* at 2033.

²³⁸ THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 26 (2008), http://www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf [hereinafter RACIAL DISPARITY MANUAL].

²³⁹ See MAUER, *supra* note 189, at 212–14.

²⁴⁰ RACIAL DISPARITY MANUAL, *supra* note 238, at 26 (suggesting alternatives be used to deal with “status offenses for juveniles, or encounters with the mentally ill or homeless persons”).

²⁴¹ Stuntz, *supra* note 235, at 2032.

²⁴² *Id.* at 2034.

them to assess culpability on a less rigid and more individual basis than currently permissible under most laws, particularly in the war on drugs.²⁴³ This approach, not unlike a restorative justice model, allows the local community to control its own social norms and decreases the focus on punitive responses to crime.²⁴⁴ By focusing on local community control over the criminal justice system and shifting the institutional locus of power, these reforms communicate a narrative of racial injustice that recognizes the burden of incarceration on urban communities of color, making them worthy of governmental resources and autonomy in shaping the criminal justice system.

B. Eliminating Colorblind Justice and Looking Beyond the Criminal Justice System

While shifting control may offer a change in the dominant narrative of racial injustice in the public discourse, some scholars would argue that such reforms (while perhaps helpful) do not go far enough to address the needs of communities of color and that they even retain the danger of eliding racism by placing the responsibility for the enforcement of already racist norms in the criminal justice system on minority communities. One approach for addressing the more institutionalized problems in the criminal justice system is to abandon the preference for policies that are “race neutral” or colorblind.²⁴⁵ Several scholars argue that race should become a more explicit consideration as a way to draw connections between policies of law creation and enforcement and their resulting racial disparities.

For example, Angela J. Davis recommends the use of racial impact data in prosecutors’ offices as a way of keeping track of how similarly situated offenders are treated in terms of indictments, plea agreements, and sentencing as a way to root out racial bias at the level of prosecutorial discretion.²⁴⁶ The public distribution of such reports can allow for voters as well as defendants to hold prosecutors accountable for racial disparities.²⁴⁷ Importantly, this data collection will also encourage prosecutors to consider

²⁴³ *Id.* at 2034, 2036–39.

²⁴⁴ See MAUER, *supra* note 189, at 214.

²⁴⁵ John A. Powell, *Race, Place, and Opportunity*, THE AMERICAN PROSPECT, Sept. 22, 2008, available at http://www.prospect.org/cs/articles?article=race_place_and_opportunity.

²⁴⁶ See Davis, *supra* note 81, at 54–55.

²⁴⁷ *Id.* at 55–60.

how discretionary decisions have a racial impact, thus potentially disrupting patterns of unconscious racism.²⁴⁸

As a way of dealing with institutional racism at the legislative level, the Connecticut and Iowa legislatures have adopted the “racial impact rule.”²⁴⁹ While there are some variations between the states, the rule requires the preparation of a racial impact statement regarding the potential disparate effects of a bill that approves changes to the criminal justice system regarding public offenses, sentencing, and parole and probation.²⁵⁰ This rule may not have an immediate or definitive substantive impact on legislation nor does it reach into the past to review prior policies of the criminal justice system. However, such legislation does offer a narrative of racial injustice that recognizes the possibility of institutional racism in the criminal justice system; though “a legislator’s intent in passing” criminal justice laws is not meant to enact a racial disparity, it “certainly [can be] the effect,” which legislators should “consider . . . in advance.”²⁵¹

In addition to these measures, another move away from policies advocating colorblindness in the criminal justice system is to reject appeals to universalism and policies that purport to act uniformly for all individuals.²⁵² In its place, John A. Powell, executive director of the Kirwan Institute for the Study of Race and Ethnicity, suggests a strategy of “targeted universalism” that works to address the needs of people of color while also attending to the needs of the larger population as a whole.²⁵³ Targeted universalism accomplishes this goal by recognizing how groups are differently situated with respect to the fundamental resources and institutions of society.²⁵⁴ Because the needs of marginalized groups tend to overlap and inform each other, the concerns of effecting racial equality in the criminal justice system cannot be assessed in isolation from other problematic aspects

²⁴⁸ Some states like North Carolina have contemplated at least the use of comparable data, particularly with regard to the providing evidence of the role of racial bias in death penalty cases. Whitney Woodward, *Advocates Make Case for Racial Justice Act*, NEWS & OBSERVER, May 28, 2008, available at <http://www.newsobserver.com/news/story/1087430.html>.

²⁴⁹ Press Release, The Sentencing Project, Connecticut Becomes Second State in Nation to Enact Racial Impact Rule (Jan. 9, 2009), http://www.sentencingproject.org/detail/news.cfm?news_id=541.

²⁵⁰ *Id.* (noting also that Connecticut rule does not make impact statements mandatory); Marcia Coyle, ‘Racial Impact Statements’ a Reality in Iowa, NAT’L L.J., April 28, 2008.

²⁵¹ Press Release, *supra* note 249.

²⁵² See ALEXANDER, *supra* note 220, at 228 (“[Color] blindness . . . prevents us from seeing the racial and structural divisions that persist in society . . .”).

²⁵³ See Powell, *supra* note 245.

²⁵⁴ See *id.*

of opportunity for communities of color.²⁵⁵ Thus, in order to provide for a more equitable criminal justice system, policies must also assess and account for connecting communities to opportunities such as education, housing, and employment.²⁵⁶

In addressing this situatedness of communities of color, Professor Dorothy Roberts has also argued that while changes are required in the criminal justice system itself, these changes alone are not enough. Instead, these changes must be accompanied by “the massive infusion of resources in innercity neighborhoods to build local institutions, support social networks, and create social citizenship,” which have ultimately been undermined, if not entirely destroyed by the failures of the criminal justice system with respect to mass incarceration and felony disenfranchisement.²⁵⁷ By addressing the situatedness of communities of color in relation to resources and opportunities, legislative policies can convey a narrative of racial injustice that accounts for the effects of institutionalized racism by attending to the ways in which oppressive and racially disparate policies and practices interact beyond the confines of the criminal justice system.

C. *The New Abolitionist Movement*

A more radical approach to changing the narrative of racial injustice in the criminal justice system stems not from the discourses of institutional or unconscious racism, but from an appeal to the injustice of past American “caste” systems including Jim Crow and slavery. As Michelle Alexander has indicated in her work on mass incarceration and felony disenfranchisement, the policies of the criminal justice system have had substantially the same effect as the Jim Crow regime in the South—legally barring African Americans from substantially moving up in society in terms of education, employment, housing and politics.²⁵⁸ Ultimately, the policy of mass incarceration in the criminal justice system works a “tightly networked system of laws, policies, custom, and institutions [operating] collectively to ensure the subordinate status of a group largely defined by race.”²⁵⁹ Following a similar rationale, Dorothy Roberts has argued that the disproportionate impact of mass incarceration, capital punishment, and police terror on African Americans is a continuing form of racial subjugation that extends back historically to slavery.

²⁵⁵ See *id.*

²⁵⁶ See *id.*

²⁵⁷ Roberts, *Mass Incarceration*, *supra* note 211, 1304–05.

²⁵⁸ ALEXANDER, *supra* note 220.

²⁵⁹ *Id.*

Addressing a racial caste system calls for a markedly different response than mere legislative reforms. In calling the social justice community to arms, Professor Roberts has advocated the inception of a new “abolitionist” movement.²⁶⁰ The goals of this movement are

to drastically reduce the prison population by seeking state and federal moratoriums on new prison constructions, amnesty for most prisoners convicted of nonviolent crimes, and repeal of excessive, mandatory sentences for drug offenses; to abolish capital punishment; and to implement new procedures to identify and punish patterns of police abuse.²⁶¹

While some of these goals are intertwined with suggestions of criminal justice reform, the narrative that an abolitionist movement conveys for understanding racial injustice in the twenty-first century is that it is not so different from the racial injustice that existed during the era of the civil rights movement (and slavery before that), which lawmakers are all too eager to embrace in enacting racial justice reforms like the Emmett Till Unsolved Civil Rights Crime Act.

VI. CONCLUSION

While the narrative of racial injustice offered by the Emmett Till Unsolved Civil Rights Crime Act reproduces a limited view of the significance of racial disparities within the criminal justice system, hope remains that this narrative is subject to change both in the law and in the public discourse. On February 26, 2009, United States Senators Benjamin L. Cardin (D-Md.) and Arlen Specter (recently D-Penn.) introduced legislation entitled the Justice Integrity Act of 2009 (S. 495) with the purpose of addressing racial bias in the criminal justice system.²⁶² U.S. Representatives Steve Cohen (D-Tenn.) and John Conyers (D-Mich.) proposed similar legislation (H.R. 1412) in the House of Representatives on March 10, 2009.²⁶³ Senator Cardin described the problems of racial bias as ones that

²⁶⁰ Roberts, *Racial Bias*, *supra* note 190, at 283–85.

²⁶¹ *Id.* at 284.

²⁶² Press Release, The Sentencing Project, Cardin, Specter Introduce Bill to Return “Equal Protection Under the Law” to U.S. Justice System (Feb. 27, 2009), <http://www.sentencingproject.org/NewsDetails.aspx?NewsID=791> [hereinafter Cardin, Specter Press Release]. This bill was referred to the Committee on the Judiciary on February 26, 2009 and no further action was taken.

²⁶³ Press Release, The Sentencing Project, Congressmen Cohen, Conyers Introduce Legislation to Study Racial Disparities in the Justice System (Mar. 12, 2009), <http://www.sentencingproject.org/NewsDetails.aspx?NewsID=675>. The bill was referred

have “infected” the criminal justice system, which suggests some recognition of the more institutionalized and unconscious effects of racism.²⁶⁴ Moreover, in his speech introducing the bill, Cardin recognized the importance of looking at “disparities in our justice system that have existed for many years and can be traced back to slavery and the Jim Crow era.”²⁶⁵

The proposed legislation adopts a framework for criminal justice reform not unlike the racial impact studies suggested by Angela J. Davis and the racial impact rules in Connecticut and Iowa. It would institute ten pilot programs across the nation to collect information regarding the effects of racial bias and develop a plan for how these pilot districts can reduce these effects in charging, plea bargaining, and sentencing.²⁶⁶ While both houses have referred the bill to committee and its fate remains unclear, these legislative proposals create a space for challenging the “majoritarian mindset” of what constitutes appropriate race relations in this country beyond the limiting narrative offered by the Emmett Till Unsolved Civil Rights Crimes Act. This new legislation offers an opportunity to tell a different story that reflects the broader impact of racial inequality, particularly as it pertains to the experience of people of color in the criminal justice system.

to the House Committee on the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security on April 27, 2009 and no further action was taken.

²⁶⁴ Cardin, Specter Press Release, *supra* note 262.

²⁶⁵ 155 CONG. REC. S2566 (daily ed. Feb. 26, 2009) (statement of Sen. Cardin).

²⁶⁶ *Id.*